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ALTERNATIVE FAMILIES: OBTAINING TRADITIONAL FAMILY BENEFITS THROUGH LITIGATION, LEGISLATION AND COLLECTIVE BARGAINING

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Historically, the traditional family, consisting of individuals related by blood, marriage or adoption, has been the largest segment of the American population.¹ Over time, it has obtained far-reaching legal protections

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1. Testimony of History and Demography Professor Steven Ruggles, Report of the Equal Opportunities Commission Alternative Family Rights Task Force, April 11, 1985, section F, pg. 1. [hereinafter cited as Task Force Report.] The Madison Equal Opportunities Commission established the task force to study the desirability and feasibility of enacting local legislation which would grant traditional family benefits to alternative families in the areas of employment-related benefits, single-family housing, family memberships in organizations, authorization of emergency medical treatment and hospital visitation. The Madison ordinance, currently being drafted by the City Attorney for introduction to the Madison Common Council, would require all employers, organizations and medical facilities within the city's boundaries to extend these traditional family benefits to alternative families. Alternative families would be required to register with the City Clerk before becoming eligible for benefits. This author was co-chair of the task force during its two and one-half year existence and has been a Commissioner on the Equal Opportunities Commission throughout its discussion of an alternative family rights ordinance.

Several other cities have passed or are also studying some type of domestic partners' legislation which would grant employment benefits to domestic partners of city employees. Cities that have passed ordinances include Berkeley and West Hollywood, California. Cities currently studying these ordinances include Santa Cruz and Oakland, California. A Minneapolis, Minnesota ordinance, being studied, would extend benefits to alternative families on a city-wide basis, similar to the Madison ordinance. East Lansing, Michigan is considering a zoning ordinance that would expand its "family" definition to include alter-

and societal benefits.² The United States Supreme Court has held that the Fourteenth Amendment's due process clause protects personal choice in matters of family and marriage and establishes the family as a private realm into which the State cannot enter.³

Today, traditional families most frequently are nuclear families consisting of the husband, the wife, and their dependent children. By virtue of their protected legal status, these nuclear families enjoy benefits which have come to be viewed as entitlements or rights. These benefits are extended to nuclear families alone.⁴ They include the opportunity to live in neighborhoods zoned for single-families; receive employment-based health insurance, bereavement and sick leave, pensions, moving expenses, library and recreational privileges, and low cost day care and travel packages; sue for loss of consortium, workers compensation or unemployment compensation;⁵ visit family members in hospitals and authorize their emergency

native families.

2. While holding that unrelated individuals could not be legally excluded from a single-family neighborhood, the Michigan Supreme Court noted:

That government can classify, draw lines around, and support the biological family is well settled, as evidenced by our tax and inheritance laws. Our decision here is not in derogation of the cultural, economic, and moral value of the traditional family and its essential and unique role in our society, but rather is based on the fact that the exclusion of groups such as defendants from a residential neighborhood is not in any way supportive of 'family values.'

Charter Township of Delta v. Dinolfo, 419 Mich. 253, 277, 351 N.W.2d 831, 843 (1984).

3. Moore v. East Cleveland, 431 U.S. 494, 499 (1976).

4. Some of these benefits are granted to extended families, such as the right to live together in single-family neighborhoods. See *infra*, fns. 58 to 67 and accompanying text. But most of them are restricted to nuclear families or give nuclear family members preference over extended family members. In fact, one extended family member testified before the task force requesting inclusion of extended families in the alternative family rights ordinance. He lived with his father, his children, his sister, and his sister's children as a family. They had applied for family memberships in various organizations and were denied memberships because they were not a nuclear family. Task Force Report, *supra* fn. 1, section J, pg. 18-19.

The task force excluded traditional extended families from its definition of alternative families by including the phrase "not related by blood, marriage or adoption." See, *infra*, fn. 8. This resulted primarily from the negative response by insurance companies against including traditional extended families. The insurance companies were concerned that adverse selection would increase if extended family members could choose to insure their elderly parents or relatives through employer-based group health insurance. See, *infra*, fns. 117 to 128 and accompanying text. During its deliberation, the Madison Equal Opportunities Commission decided that traditional extended families encounter the same type of discrimination as did other alternative families. It voted to eliminate the phrase "not related by blood, marriage or adoption" from the task force's definition of an alternative family. However, because the Commission restricted alternative family size to "two adults . . . plus dependents," many traditional extended families are still excluded from coverage under the proposed Madison ordinance.

5. Generally, this article discusses benefits that can be obtained through litigation, local legislation and collective bargaining agreement. Therefore, this article does not discuss extending some traditional family benefits to alternative families, such as favorable tax and inheritance status, state or federally controlled entitlements programs (such as

medical treatment; and receive low cost family rates from organizations such as health clubs, museums and art centers.

Due to the legal protections and benefits given to the traditional nuclear family, one could expect that most Americans live in nuclear families and receive these protections and benefits. However, less than thirty percent of all Americans live in nuclear families.⁶ Instead, more and more individuals are living together as unmarried heterosexual couples, gay or lesbian couples, or as other family groups such as communes or several person households.⁷

These individuals are forming alternative families.⁸ They are not

welfare, Aid to Families with Dependent Children and Social Security) and intra-family privileges in law suits. This discussion is excluded because of space considerations; the author does not intend to imply, through its exclusion, that these benefits should remain restricted to only traditional families. Also, it does not discuss rights between alternative family members in property settlements and support actions at the termination of the family relationship. For a discussion of these issues as related to cohabitating heterosexual couples, See, Blumberg, *Cohabitation Without Marriage A Different Perspective*, 28 U.C.L.A. L. Rev. 1125 (1981). This article does not extensively discuss the question of state or federal preemption of municipalities' power to extend certain benefits to alternative family members. [See, *infra*, fns. 222 to 224 and accompanying text.]

The benefit of suing for loss of consortium is included because it is a common law right susceptible to expansion through litigation [See, *infra*, fns. 161 to 193 and accompanying text.] Similarly, brief references to unemployment and workers compensation are made because these benefits, depending on the particular statutory language, could be extended through litigation. [See, *infra*, fns. 195 to 205 and accompanying text.]

6. Ruggles, *supra* fn. 1, at p.1. Ruggles defines a nuclear family as a married couple and their dependent children. According to Lenore Weitzman, approximately 32% of all American households are nuclear families and another 30% consist of a married couple without children or whose children have left home. Weitzman, *Changing Families, Changing Laws: Ten Major Trends That Have Altered the Lifestyles of Parents and Children* 5 Fam. Advocate 2, 3 (1982).

7. Cohabitation between heterosexual couples has increased by 800 percent between 1960 and 1970. During the same time period, the number of legally married couples increased by only 10 percent. In 1980, Census Bureau statistics estimated that 1.8 million Americans lived as cohabitating couples, a 300 percent increase since 1970. Demographers estimate that by 1990 only slightly more than 25% of all households will consist of traditional families, married couples with children. Comment, *Loss of Consortium: Adaption of a Common Law Cause of Action to a Modern Day Reality*, 54 U.M.K.C. L. Rev. 512, 513 (1986) [hereinafter cited as *Loss of Consortium*].

Ruggles estimates that 1 in 25 Americans or 10,000,000 people could benefit from the extension of traditional family benefits to alternative families. Included in these figures are the 3.3 million households of groups of unrelated individuals who contain 7.7 million persons. Ruggles, *supra* fn. 1, at p. 2. These changes in the composition of households and families led the Wisconsin Center for Demography and Ecology to recommend that for the 1990 census, a question should be included so that individuals could identify a partner or a lover, rather than simply indicating whether they are "single" or "married." This recommendation resulted from the conclusion that social reality changes more rapidly than the statistical system. Testimony of Urban Planner Steve Bubul, Task Force Report, *supra* fn. 1, at section J, p. 36-38.

8. One definition of an alternative family comes from the Task Force Report, *supra* note 1, at p. 1 of the introduction. Under that definition, an alternative family is:

Two or more adults, not related by blood, marriage or adoption, who are in-

challenging the family as a valid life choice; they are challenging the current conception of what a family's composition must be. They point out that the word "family" did not originally include a restriction to nuclear families or even extended families related by blood, marriage or adoption.

[T]he ordinary concept of (family) does not necessarily imply only a group bound by ties of relationship. 'Family' is derived from the Latin 'familia.' Originally the word meant servant or slave, but now its accepted definition is a collective body of persons living together in one house, under the same management and head subsisting in common, and directing their attention to a common object, the promotion of their mutual interests and social happiness. . . . This court has said that the term, "family," did not necessarily exclude from its meaning a group of unrelated persons living together in a home.⁹

Members of alternative families maintain that their families provide the same opportunities for companionship, care, love, intimacy and self-identification as do traditional nuclear families. They argue that because their alternative families fill the same function and provide the same advantages as traditional families, both to the individuals involved and to society, their families should receive the same legal protections and benefits that traditional families receive. These alternative families have begun challenging the restriction of protections and benefits to traditional families and have begun pushing for legal recognition of their families in the courts, through local legislation, and under collective bargaining agreements.

volved in a mutually supportive, committed relationship and who are voluntarily registered publicly . . . together with their dependent children.

Other ordinances currently in existence or being studied usually refer to domestic partners, not alternative families, and usually define domestic partners as lesbian or gay couples. With the exception of the Madison ordinance, all these ordinances have only extended to considered extending benefits to lesbian and gay couples, usually with the explanation that these couples, unlike unmarried heterosexual couples, cannot gain legal recognition for their relationship because all fifty states prohibit them from marrying. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part II*, 11 U. Dayton L. Rev. 275, 373 (1986). [hereinafter Rivera]. For a discussion of the issue of gay and lesbian marriage, see, Ingram, *A Constitutional Critique of Restrictions on the Right to Marry - Why Can't Fred Marry George - or Mary and Alice at the Same Time?* 10 J. Contemp. Law 33 (1984). See also, *infra* fn. 19.

For purposes of this article, the broad Madison task force definition will be used when referring to alternative families, except the task force's exclusion of families related by blood, marriage or adoption is eliminated. See, *supra*, fn. 4 and the discussion contained therein. Before sending its proposal to the City Attorney's Office for drafting, the Madison Equal Opportunities Commission altered the definition of an alternative family to include only "two adults . . . plus dependents" thus making its alternative family equivalent to the traditional nuclear family. Because this was done for political reasons and not because extended alternative families do not exist, this article will use the original task force definition when referring to alternative families. Thus, alternative families will include unmarried heterosexual couples, lesbian and gay couples, and other groups of adults and children who consider themselves to be a family.

9. *Crowley v. Knapp*, 94 Wis. 2d 421, 436, 288 N.W.2d 815, 823 (1980).

This article will first discuss the constitutional and equitable basis for extending rights to alternative families. Next, it will discuss each major protection and benefit granted to traditional families and then examine the litigation, legislation, and collective bargaining agreements obtaining or attempting to obtain the same benefit for alternative families. This article will end by arguing that equity and justice require an extension of these benefits to alternative families.

I. The Constitutional and Equitable Basis for Extending Protections and Benefits to Alternative Families

Alternative families want the same legal protections and benefits that traditional families receive. In advocating for the extension of these protections and benefits to their families, they point to a constitutionally-protected freedom of intimate association. That such a freedom exists beyond the bounds of the traditional family is denied by some commentators. But regardless of whether a constitutional basis exists for an extension of protections and benefits to alternative families, equity demands that alternative families receive equal treatment under the law. And alternative families are making, and winning, their demand for such equal treatment.

While granting constitutional protection to the privacy rights of married couples, Justice Douglas eloquently described the marital relationship in *Griswold v. Connecticut*:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes, a harmony in living, not political faiths, a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁰

Although the Supreme Court has never explicitly enunciated a constitutionally-protected freedom to form intimate associations, Kenneth Karst argues that the Court's decisions on marriage, procreation, legitimacy, and parent-child relations have resulted in the overall protection of such a freedom.¹¹ He claims that the freedom to form intimate associations is behind the Court's decisions granting legal protections to traditional families. And this same freedom forms the basis for alternative families' constitutional claim for extending legal protections to their families.

Intimate association is a close and familiar personal relationship with another that in a significant way is comparable to marriage or a family relationship. The values that intimate association promote are the oppor-

10. 381 U.S. 479, 486 (1965).

11. Karst, *Freedom of Intimate Association*, 89 Yale L.J. 624, 626 (1979-1980) [hereinafter cited as Karst]. Karst developed his outline of the freedom of intimate association in this article. But other authors, most notably Laurence Tribe, had earlier outlined this type of constitutional protection although without the same name. See, Tribe, *American Constitutional Law*, 985-90 (1978).

tunity to enjoy the companionship of certain other people¹²; the opportunity to satisfy the need to love and be loved, to care and be cared for¹³; the opportunity for intimacy with another person which includes sharing personal information and sharing present and future important experiences¹⁴; and the opportunity for self-identification by telling oneself and society about oneself through one's choice of partners and the forming of an intimate association.¹⁵ These values are inherent in most alternative family relationships in the same way they are inherent in most traditional family relationships.

The freedom to form intimate associations is not absolute and it must give way to overriding state interests.¹⁶ But typically individuals are free to form intimate associations and have their associations protected from state interference. The Supreme Court has specifically protected intimate associations between married couples¹⁷ and between unmarried heterosexual couples.¹⁸ Although the state does not affirmatively force an individual to choose a particular type of intimate association,¹⁹ the state does grant preference to some forms of intimate association by conditioning the receipt of certain material benefits on an individual's associational status.²⁰

Alternative family members are beginning to challenge the grant of legal protections and material benefits on the basis of a preferred associational choice. They are not willing to be restricted to the traditional nuclear family model when forming intimate associations. And they are not willing to endure reduced legal protections and fewer material benefits as the cost of expressing their choice of intimate association.

Some commentators argue, however, that a constitutionally-based freedom to form intimate associations does not exist beyond the traditional family relationship, the marital relationship and the parent-child relationship that have been specifically protected in the Supreme Court's deci-

12. Karst, *supra* fn. 11, at 630.

13. *Id.* at 632-33. Karst notes that this opportunity also includes the opportunity to feel the guilt of exploitation, the anxiety of dependency and all the related angers and agonies of a relationship. *Id.*

14. *Id.* at 634-35.

15. *Id.* at 636.

16. *Id.* at 627.

17. *Griswold*, 381 U.S. at 486.

18. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). This decision does show the court's willingness to specifically recognize the rights of this particular form of alternative family. *But see*, *Hollenbough v. Carnegie Free Library*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1374 (3rd Cir.), *cert. denied*, 439 U.S. 1052 (1978) (upheld Library's decision to fire two heterosexual employees for living openly in a nonmarital relationship).

19. All fifty states do, however, prohibit same-sex marriage. Rivera, *supra* fn. 8, at 373. *See also*, *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971); Note, *Developments - The Family*, 93 Harv. L. Rev. 1156, 1283-1289 (1980) [hereinafter cited as *Developments*] and *supra* fn. 8.

20. Karst, *supra* fn. 11, at 648.

sions.²¹ They note that the Court's decisions have effectively defined a "family" as persons related by blood, marriage, or adoption²² and assert that attempts to link unconventional lifestyle preferences and associations, such as alternative families, to the traditional family "liberty" cases are misplaced.²³ The Supreme Court has not shown a willingness to recognize a constitutional freedom to form intimate associations that extends beyond marriage, kinship and adoption.²⁴ The Court's recent decision in *Bowers*

21. See, Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 471 (1982-83) [hereinafter cited as Hafen] and others cited therein.

22. Id. at 491-492. But see, *Developments, supra* fn. 19, at 1271 which argues that the Court has shown a willingness to consider a "broad" concept of family which extends beyond the traditional family to other relationships. It also notes that "the Court has consistently avoided giving a definitive and comprehensive definition of the family." Id.

23. Id. at 524. He notes that such attempts have been made by Kenneth Karst, Laurence Tribe [see *supra*, fn. 11] and David A.J. Richards. [See, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L.J. 957 (1979).]

24. Hafen, *supra* fn. 21, at 504. The fact that the Supreme Court has not yet explicitly recognized constitutionally-protected freedom to form intimate associations beyond this realm does not mean, however, that the Court has indicated that such an extension is unlikely. If the Court follows its language stated in *Roberts v. United States Jaycees*, 104 S.Ct. 3244 (1984) such an extension may be just waiting for the presentation of a sympathetic factual situation to the Court. While discussing the constitutional safeguards to choose and maintain certain intimate human relationships because of the role of those relationships in safeguarding the individual freedom that is central to our constitutional scheme, the Court stated:

Family relationships, by their very nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sort of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Id. at 3250-51.

The Court used this discussion of family to contrast that type of relationship with large, unselective associations like the Jaycees. Id. at 3251. It is important to note that in carefully laying out the characteristics of a family, the Court in no way indicted that a heterosexual married couple must form the base of constitutionally-protected family. Alternative families have all the characteristics that the Court specified as necessary for the formation of a family that would be protected by the Constitution.

Although the Court decided *Jaycees* before it decided *Bowers v. Hardwick*, *infra* fn. 25, the *Bowers* decision does not establish that the court will reject constitutional protection for all alternative families as it did reject constitutional protection for gay men's sexual activity. In *Bowers*, the Court based its decision on the historical discrimination against gay men. [This author believes that the *Bowers* decision was ill-conceived and based on prejudice, rather than the application of well-reasoned constitutional principles.] Such a well-established history against alternative families does not exist. Additionally, because the nature of an alternative family's relationship is more than "mere" sexual activity, it is possible that the Court would protect, for example, an alternative family formed by lesbians or gay men and their children, whereas it would not protect gay men's right to consen-

*v. Hardwick*²⁵ upholding the constitutionality of a Georgia statute outlawing homosexual sodomy between consenting adults in private, lends credence to this argument.

Regardless of how one analyzes the Supreme Court's prior decisions in this area, it cannot be denied that the Supreme Court has not yet recognized a constitutionally-protected freedom to form intimate associations beyond the traditional relationships noted above.²⁶ Until such recognition occurs, alternative families will have to continue to press for the extension of traditional families' protections and benefits through litigation, legislation, and collective bargaining agreements.²⁷ But throughout this process, their strongest argument lies in the simple equity and justice inherent in their claim for equal treatment.

Alternative family members have expanded their own definition of what constitutes a family and they are challenging society and the legal system to accept and protect their families. Alternative families possess the same attributes as traditional families.²⁸ They provide the same benefits to

sual sexual activity. *See also, Developments, supra* fn. 19, which argues that by identifying some degree of permanence as a necessary condition for familial protection, such a distinction by the Court may be possible. Therefore, given the Court's long-standing protection of the family, and despite its decision in *Bowers*, it is reasonable that the Court, if presented with a sympathetic factual situation, would grant constitutional protection to alternative families.

25. 54 U.S.L.W. 4919 (U.S. June 30, 1986).

26. The Supreme Court, however, has shown a willingness to recognize families beyond the nuclear or the extended family. In *Smith v. Organization of Foster Families for Equity and Reform*, [OFFER], 431 U.S. 816, 844 (1976), the Court recognized that a deep, loving, and interdependent relationship can exist in the absence of a blood relationship. The Court stated that the foster family did deserve more recognition for its familial relationship than did a "mere collection of unrelated individuals." *Id.* at 844-45. The Court, however, did distinguish the foster family from the "natural" family because unlike the "natural" family, the foster family has its source in contractual arrangements set up by the state. This distinction is inapplicable when comparing alternative families with traditional families because neither family-type has its origin in contractual relations. Rather, these families' origins are based on the intimate associational choices of the original partners.

27. *See* Parts II, III, and IV, *infra*.

28. After analyzing the Court's major decisions in the family and marriage definition cases, it has been suggested that relationships that the Court may constitutionally protect in the same manner that it protects the traditional family have one or more of the following five attributes. *Developments, supra*, fn. 19, at 1280-83. Those attributes are: 1) biological relationship, 2) potential parent-child relationship, 3) cohabitation, 4) permanence and formal commitment, and 5) psychological support and involvement. *Id.* at 1281. All alternative families possess some or all of these attributes and therefore are relationships that would be protected by the Court under this analysis.

1) Biological relationship. Some alternative families include biological parent-child relationships or other blood relatives, including siblings, cousins, and distant blood relatives. Additionally, *Developments supra* fn. 19 notes that it is the associational element of the biological relationship, not the biological connection, that makes this connection fundamentally important to individuals. *Id.*

2) Potential parent-child relationship. Some alternative families provide the potential for parent-child relationships because they are formed by heterosexual partners who have

both individuals and society that traditional families provide because they

the same potential for children as do married couples. Additionally, lesbian and gay couples often have children in their families as result of children from one or both partner's previous marriage; adoption; or, in the case of lesbian couples, artificial insemination, and in the case of gay couples, using a surrogate mother. In fact, so many lesbian and gay couples are deciding whether to have children that books have been written to help guide the couple through their decision. See, C. Pies, *Considering Parenthood: A Workbook for Lesbians* (1986).

3) Cohabitation. Most alternative families share a home, in the same way that most traditional families share a home. However, the expectation of a one family home where all family members live has changed with the advent of "commuter" relationships where one family member commutes between a residence in the city where his or her job is located and the residence where the rest of the family lives. Not cohabiting in the same residence has not resulted in a loss of protections and benefits for the traditional family. And to the extent that traditional families are no longer expected to maintain only one residence in order to obtain family protections and benefits, so too alternative families should not have to establish the existence of this attribute before receiving alternative family protections and benefits.

4) Permanence and formal commitment. Alternative families can be expected to have the same level of permanence in their relationships that traditional families have. A fuller discussion of the reasons behind this assertion is found later in this footnote. Additionally, requirements such as registering with the City Clerk under the Madison proposed ordinance [see, *supra*, fn. 1] or signing an affidavit for the Berkeley School District [see, *infra*, fn. 141] before becoming eligible for alternative family protections and benefits shows the same type of formal commitment to the relationship that is manifested by a couple obtaining a marriage license.

5) Psychological support and involvement. This attribute, which usually results from the existence of any or all of the previous four, is what makes long-standing, intimate family relationships so significant for individuals. *Developments, supra* fn. 19, at 1283. Alternative families provide their families with the same psychological support and involvement that is expected, and sometimes found, in traditional families. Society's recognition of and the legal system's protection of alternative families would correspondingly strengthen this attribute in alternative families.

In justifying the legal distinction between traditional and nontraditional (alternative) families, Hafen argues that the one thing that families based on marriage, kinship and adoption possess, and that alternative families lack, is an expectation in the permanence of the relationship.

This analysis of the nature of an interest or a relationship is so significant that it warrants extraordinary constitutional protection is one of the court's most important contributions to an understanding of the constitutional test that puts marriage, kinship, and adoption in a different category from other relationships. The *relative permanence* of relationships arising from marriage, kinship, or adoption creates the 'justifiable expectation . . . that their relationship will continue indefinitely,' which gives such relationships a unique nature in terms of both human and legal expectations Absent a verifiable basis for presuming permanent commitments, neither the parties involved nor the state can reasonably assume enough about the nature of the relationship to warrant the personal investment or the full-blown legal protection necessary to sustain family relationships.

Hafen, *supra* fn. 21, at 504, 506. (emphasis in original) (footnotes omitted).

However, Hafen does not provide support for his assertion that traditional families are more permanent in nature than alternative families. He simply asserts that "[i]mpermanent relationships [such as alternative families] that perform some intimate or associational 'functions' cannot claim the same position as marriage and kinship in ensur-

are the same as traditional families in every way except actual composition. In the same manner as traditional families, alternative families provide nurturance, stability and continuity for their children and encourage their family members to work for and invest themselves in the ongoing existence of their family relationship.²⁹ For exactly the reasons that tradi-

ing a political structure that limits government, stabilizes social patterns, and protects pluralistic liberty through the power of its own relational permanency." Id. at 482. (footnotes omitted). In his next sentence, Hafen acknowledges that this assertion of heightened permanence cannot be empirically verified and states that empirical studies cannot "confirm or refute the assumptions which must be made, *one way or another*, in formulating a legal regime to govern domestic relationships." Id. at 482-83. (emphasis added).

It is just as valid, however, to make a different assumption regarding the relative level of permanence that would exist between traditional families and alternative families, especially if alternative families received the extensive protections, benefits and societal support currently given to traditional families. This is especially true considering the extreme increase in the divorce rate. Hafen acknowledges that between 1960 and 1978, the divorce rate increased 157 percent. Additionally, according to Lenore Weitzman, the current divorce rate is at least forty-eight percent (48%) and may actually be significantly higher. Weitzman, *supra* fn. 6, at 4-5.

Given this fact that almost half of all marriages now end in divorce, even with the societal support and benefits those marriages receive, it is hard to believe in a "justifiable expectation . . . that [the marital] relationship will continue indefinitely." Hafen, *supra* fn. 21, at 486, citing Smith, 431 U.S. at 860 (Stewart, J., concurring). In fact, if permanence is the main distinction between traditional families and alternative families, as Hafen argues, there is no strong reason for restricting legal protections and benefits to traditional families. While the number of alternative family relationships which end in termination is unknown, it cannot be significantly higher than the 48% conservative estimate of marriages ending in divorce in this society.

Traditional family relationships may be more permanent than uncommitted nonmarital relationships, but alternative family relationships are also more permanent than uncommitted nonmarital relationships. This is because alternative families have formed a family relationship, as opposed to an uncommitted, intimate association. Thus, the same permanence expected of traditional nuclear family relationships should also be expected of alternative family relationships. In the same way that obtaining a marriage license indicates a step beyond an impermanent, uncommitted relationship, so too would registering as an alternative family indicate a step beyond an impermanent, uncommitted relationship. In both instances, the family members are showing their intent to form a lasting, legally protected relationship. Thus, in both instances, society and the legal system should look upon each relationship with a belief in the relationship's permanence. If both traditional and alternative families have similar expectations of permanency, then Hafen's justification for treating them differently under the law is eliminated.

29. Hafen, *supra* fn. 21, at 475, 486. The "proof" or "evidence" behind this statement comes from the author's four year study of alternative families as a member of the Madison Equal Opportunities Commission and its Alternative Family Rights task force. See, *supra*, fn. 1. By listening to the testimony of numerous alternative family members, it is apparent that these families consider their role and their function as equivalent to that of the traditional family and that these families do, in fact, possess the same attributes as traditional families. The "best evidence" for this statement would come from reading the entire task force report. See, *supra*, fn. 1. But because most readers will be unable to do that, it is hoped that the "truth" of this statement will become apparent after the reader has read the many examples included in this article. See, also, Comment, *Homosexuals' Right to Marry*, 128 U.Pa. L. Rev. 193, 197-99 (1979) (references to psychological and sociological "evidence" showing that established homosexual relationships are virtually

tional families receive protections and benefits from society — because it is for the good of both individuals and society to encourage the permanence and stability of these relationships — alternative families also need society's support and encouragement. Because they provide the same benefits to society, they deserve the same protections and benefits from society. Simple equity and justice require this equivalent treatment. "Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."³⁰ Those laws and the entitlements to benefits obtained by traditional families should be equally granted to alternative families.

Very slowly, the public emergence of alternative families is altering society's traditional definition of what constitutes a family. And very slowly, alternative families are being recognized by courts, employers, unions, insurance companies, municipalities and organizations as having an equal claim to the traditional family's legal protections and societal benefits.

II. Obtaining Traditional Family Housing Benefits for Alternative Families

Alternative families are using the court system and local legislation to challenge typical zoning ordinances that restrict single-family neighborhoods to families related by blood, marriage or adoption. They are challenging zoning ordinances restricting the number of unrelated individuals who may live together which prevents most alternative families from living in single-family neighborhoods.

The United States Supreme Court appears to have closed off the use of federal constitutional rights as a vehicle for alternative families to use in challenging these restrictive zoning ordinances.³¹ The Court has, however, clearly ruled that the federal constitution does protect the right of traditional nuclear and extended families to share a home in single-family neighborhoods.³²

identical to established heterosexual relationships) and *Developments, supra* fn. 19, at 1285-86, nn. 192-193 (presents studies on both sides of the "debate" on whether homosexuals can have lasting, psychologically satisfying relationships).

30. *Eisenstadt v. Baird*, 405 U.S. 438, 454 *citing* *Railway Express Agency v. New York*, 336 U.S. 106, 113 (1948).

31. *Belle Terre v. Boraas*, 416 U.S. 1 (1984). In *Belle Terre*, the Supreme Court rejected the claim asserted by unrelated college students of a constitutional right to live together in single-family neighborhoods. The Court did not reach the question of whether alternative families, as defined in this article, have a federal constitutional right to live together in single-family neighborhoods. Additionally, lower court decisions before the *Belle Terre* decision have held that the federal constitution does protect the right of unrelated individuals to live together in single-family neighborhoods. Alternative families may find these lower court decisions useful in claiming that their federal constitutional rights do protect them and that the *Belle Terre* decision, on its facts, does not apply to them. *See, infra*, fns. 58 to 70 and accompanying text.

32. *Moore v. East Cleveland*, 431 U.S. 494 (1976).

Although the federal constitution currently does not provide a legal basis for zoning ordinance challenges, several state courts have held that their state constitutions protect the rights of unrelated individuals, and therefore alternative families, to live together in single-family neighborhoods. Additionally, alternative families are hoping to obtain local legislation redefining "family" in zoning ordinances to include alternative families. Examination of these state cases and the proposed zoning ordinances establishes that alternative families in some states can exercise the right to live in single-family neighborhoods.

A. *Historical Protection for Traditional Families*

In 1926, the Supreme Court established the constitutional parameters of a municipality's authority to use zoning laws to designate residential, business and industrial zones within the municipality.³³ The question before the Court was whether the Village of Euclid (Village), just outside Cleveland, Ohio, could restrict land use under a comprehensive zoning plan which regulated the location of businesses, industries, apartment buildings and single family houses within the Village.³⁴ The plaintiff argued that the ordinance was an unreasonable and arbitrary exercise of the Village's police power and thus, impaired his right to property guaranteed under the United States and Ohio Constitutions.³⁵

In its first major decision upholding municipalities' authority to establish residential neighborhoods, the Court held that the Village of Euclid's zoning ordinance was a reasonable exercise of the Village's police power.³⁶ When examining the ordinance, the Court had no difficulty sustaining restrictions on building heights, use of materials and methods of construction; restrictions regulating overcrowding and fire danger; and restrictions excluding offensive businesses from residential neighborhoods.³⁷ The ultimate question raised by the case was whether a municipality could constitutionally create and maintain residential districts from which all businesses and trades were excluded.³⁸

In laying out the test for determining whether a zoning ordinance is constitutionally valid, the Court held that Euclid's zoning ordinance as a whole constituted a permissive use of the Village's police power because it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."³⁹ In reaching

33. *Euclid v. Amber Company*, 272 U.S. 365 (1926).

34. *Id.* at 379-380. Specifically, the plaintiff challenged the impact of the zoning law on his vacant property which, if unrestricted and used as business property, was worth \$10,000 per acre and if restricted and used only as residential property, was worth only \$2,500 per acre. *Id.* at 384.

35. *Id.* at 373.

36. *Id.* at 387-388.

37. *Id.*

38. *Id.* at 390.

39. *Id.* at 395. The Court noted that because the plaintiff had not objected to any

its decision that the Village could constitutionally exclude all businesses from residential districts, the Court noted that numerous zoning commissions and experts concurred in the view that segregating residential, business and industrial buildings provided numerous advantages to a community. These advantages included (a) making it easier to provide fire-fighting apparatus appropriate to the type of building and neighborhood; (b) increasing the safety and security of home life; (c) preventing street accidents, especially to children, by reducing traffic in residential neighborhoods; (d) decreasing noise and other conditions which cause or intensify nervous disorders; and (e) preserving a more favorable environment for rearing children.⁴⁰ Ensuring these advantages was an acceptable exercise of a municipality's police power as it related to health, safety, morals and welfare.⁴¹

The *Euclid* decision laid out the test for courts to use in determining whether restrictions on land use through the application of zoning ordinances were constitutional. The Court held that to be constitutional, a zoning ordinance must be a reasonable exercise of the police power by bearing a substantial relation to public health, safety, morals or general welfare. Additionally, the Court noted that even if an ordinance as a whole were constitutional, it would be possible that some provisions, set forth in "tedious and minute detail," could be arbitrary or unreasonable as applied to particular premises or under particular circumstances.⁴² Violation of this test is what alternative families must establish when raising a federal constitutional challenge to zoning ordinances.

The next Supreme Court case affecting the constitutional rights of alternative families was *Village of Belle Terre v. Boraas*.⁴³ In this case, the Supreme Court applied the *Euclid* test to an ordinance restricting the number of unrelated individuals who could live together in a single family neighborhood. This case involved a challenge to a zoning ordinance in Belle Terre, New York that restricted all land use within the Village to single-family dwellings, and excluded all lodging, boarding, fraternity or multiple-dwelling houses. The ordinance defined "family" as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."⁴⁴ The appellees were

specific application of the ordinance to his land but rather challenged the ordinance as a whole, the Court did not have to decide whether any specific application would have been arbitrary.

40. *Id.*

41. *Id.*

42. *Id.* at 394.

43. 416 U.S. 1 (1974).

44. *Id.* at 2. This ordinance does recognize the existence of alternative families but restricts their size to two persons, while leaving the size of traditional families unrestricted.

homeowners who leased their house to six college students who were unrelated by blood, adoption, or marriage.

The Court held that Belle Terre had validly exercised its police power in restricting the number of unrelated individuals who could live together within the Village.⁴⁵ After determining that the ordinance did not impinge on any fundamental rights, the Court held that the only requirement for constitutional validity was meeting the *Euclid* test: a zoning ordinance must be reasonable, not arbitrary, and must bear a rational relationship to a permissible state objective.⁴⁶ In its much-quoted language, the Court held that Belle Terre could establish single-family neighborhoods where more than two unrelated individuals were not allowed to live:

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet space where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.⁴⁷

The Court's decision has been read by some courts as allowing municipalities to constitutionally exclude unrelated individuals, regardless of the nature of their relationship with one another, from single-family neighborhoods.⁴⁸

However, it can also be interpreted as simply excluding unrelated college students from single-family neighborhoods and not reaching the question of whether an alternative family can be excluded from the same neighborhoods.⁴⁹ The Court's respect for strictly single-family neighborhoods does not conflict with admitting alternative families into these neighborhoods. Alternative families do not cause the problems associated with boarding houses, fraternity houses and "the like." In fact, because alternative families are single families, their housing needs and desires more closely resemble those of traditional families than those of the college students excluded from Belle Terre.

Rather than enunciating a constitutional exclusion of alternative families from single-family neighborhoods, the Court's decision simply repeats

45. *Id.* at 6.

46. *Id.* at 7-8. In order to be constitutionally valid, a zoning ordinance must be justifiable under the police power of the municipality, asserted for the public welfare. If the legislative classifications for zoning purposes are fairly debatable, the legislative judgment controls.

47. *Id.* at 9.

48. *See, New Jersey v. Baker*, 81 N.J. 99, 122, 405 A.2d 368, 379 (1979) (Mountain, J., dissenting) and the cases cited therein.

49. *See, Tribe, supra* fn. 11, at 989-90 n. 30.

what the *Euclid* decision indicated almost forty-five years earlier: it is constitutionally permissible for zoning ordinances to restrict residential neighborhoods to legitimate families. However, the Court seemed oblivious to the fact that legitimate families can also consist of unrelated individuals who have formed an alternative family. Thus, the Court's decision may be susceptible to a challenge by an alternative family asserting a federal constitutional right to live together in a single-family dwelling.

In his dissent, Justice Marshall laid out the approach that an alternative family could take in challenging the *Belle Terre* decision. He asserted that the majority erred by sustaining Belle Terre's zoning ordinance with only a showing of a rational relationship to achieving legitimate state objectives.⁵⁰ He argued that the ordinance violated the appellees' fundamental rights of privacy and association and thus the majority should have given the ordinance strict equal protection scrutiny.⁵¹

Although zoning officials can concern themselves with land use, Marshall contended that they cannot consider who the people are who reside in the dwellings.⁵² He asserted that the ordinance unnecessarily burdened the appellees' freedom of association and freedom of privacy and therefore was unconstitutional.

The choice of household companions—of whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from its current residents [This ordinance] thus reaches beyond control of the use of land or the density of population, and undertakes to regulate the way people choose to associate with each other within the privacy of their own homes.⁵³ (footnotes omitted)

According to Marshall, because the ordinance impinged on the appellees' fundamental rights, it would withstand their constitutional chal-

50. Village of Belle Terre, 416 U.S. at 13 (Marshall, J. dissenting).

51. Karst also argues that any governmental intrusion on choosing one's living arrangements demands a substantial governmental justification - in proportion to its likelihood to force individuals out of one form of intimate association and into another. Karst, *supra* fn. 1, at 687. He notes that the Supreme Court, in *U.S. v. Moreno*, 413 U.S. 528, 533-34 (1972), required a substantial state justification, and found it lacking, in Congress' attempt to deny food stamps to households made up of unrelated individuals. *Id.* In the same way, the Belle Terre ordinance directly assaulted the appellees' freedom to form intimate associations because it attacked living arrangements which did not fit the suburban norm - a norm no longer consistent with a majority of the population. Karst, *supra* fn. 1, at 689. As Laurence Tribe notes, the state's power to reinforce one type of relationship does not extend the power to stamp out another type of relationship, although this is what Belle Terre did by authorizing households composed of related individuals and outlawing those composed of unrelated individuals. Tribe, *supra* fn. 11, at 989.

52. Village of Belle Terre, 416 U.S. at 15.

53. *Id.* at 16-17.

lenge only if it protected a compelling and substantial governmental interest through the least intrusive means possible.⁵⁴ While Marshall agreed that the Village's interests in controlling population density, noise, traffic and parking problems and ensuring its attractiveness to families were substantial governmental interest, he concluded that the means chosen to accomplish those ends were both overinclusive and underinclusive.⁵⁵ The Village's goals could have been achieved just as effectively by an ordinance that did not discriminate on the basis of constitutionally-protected lifestyle choices.⁵⁶ Thus, by restricting the size of unrelated households while permitting related households of unlimited sizes, Marshall determined that "the village has embarked upon its commendable course in a constitutionally faulty vessel."⁵⁷

On first reading, the *Belle Terre* decision seems to crush any hope of federal constitutional protection for alternative families wanting to live in single-family neighborhoods. But by restricting the decision to its facts and by using the approach laid out in Justice Marshall's dissent, alternative families may be able to raise a successful challenge to restrictive zoning ordinances. The possible success of such a case will depend, in part, on the makeup of the alternative family involved and how closely it resembles the type of families protected in other Supreme Court decisions.

In addition to protecting the traditional nuclear family, the Supreme Court has also established an explicit constitutional protection for extended families living in single-family neighborhoods. In *Moore v. East Cleveland*,⁵⁸ the plaintiff challenged an East Cleveland zoning ordinance which only permitted traditional nuclear families in her neighborhood and thus prohibited her from living as a family with her son and two grandsons (who were cousins). In declaring the ordinance to be unconstitutional, the Court distinguished *Belle Terre* by noting that Belle Terre's zoning ordinance was constitutional because it "only" prohibited unrelated individuals from living together while East Cleveland's ordinance was unconstitutional because it sliced deeply into the family itself.⁵⁹ While acknowledging that the family is not beyond governmental regulation, the Court held that, when the government intrudes on choices concerning family living arrangements, courts must carefully examine the governmental interest involved and the extent to which they are furthered by the challenged ordinance.⁶⁰

In an opinion surprisingly similar to Justice Marshall's *Belle Terre* dissent, the Court determined that the East Cleveland zoning ordinance only minimally attained its goals of minimizing traffic and parking con-

54. *Id.* at 18.

55. *Id.*

56. *Id.*

57. *Id.* at 20.

58. 431 U.S. 494 (1977).

59. *Id.* at 498.

60. *Id.* at 499.

gestion, avoiding financial burdens on its school system and preventing overcrowding.⁶¹ "For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation."⁶² Because the ordinance did not further the desired governmental objectives and because it seriously intruded on family relations, the Court held that the ordinance was constitutionally invalid. The Court dismissed East Cleveland's argument that only the nuclear family has a constitutional right to live together and noted that the nation's tradition of family life includes "uncles, aunts, cousins, and especially grandchildren sharing a household along with parents and children."⁶³

Justice Stewart's concurring opinion provides useful arguments for alternative family members challenging zoning ordinances that restrict household composition to individuals related by blood, marriage or adoption. After carefully examining numerous state court cases that overturned zoning ordinances prohibiting unrelated persons from occupying single-family households,⁶⁴ Stewart stated that the state cases correctly delineated

61. *Id.* at 499-500.

62. *Id.*

63. *Id.* at 503-504.

64. *Id.* at 516-19 nn. 7-14 (Stewart, J. concurring). Two of the cases Justice Stewart cited are particularly important for alternative family members to use in challenging zoning ordinances. In *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966), the Illinois Supreme Court decided a case brought by four unrelated men challenging the constitutionality of a zoning ordinance that defined "family" as one or more persons each related by blood, marriage or adoption. In overturning the ordinance, the Illinois Supreme Court noted:

[W]hen other courts have been called upon to define the term 'family' they have emphasized the single housekeeping unit aspect of the term, rather than the relationship of the occupants In terms of permissible zoning objectives, a group of persons bound together only by their common desire to operate a single housekeeping unit, might be thought to have a transient quality that would affect adversely the stability of the neighborhood, and so depreciate the value of other property. An ordinance requiring relationship by blood, marriage or adoption could be regarded as tending to limit the intensity of land use and it might be considered that a group of unrelated persons would be more likely to generate traffic and parking problems than would an equal number of related persons.

But none of these observations reflect a universal truth. Family groups are mobile today, and not all family groups are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the 'respective spouses' of persons related by blood, marriage or adoption, can hardly be regarded as an effective control on the size of family units.

The General Assembly has not specifically authorized the adoption of zoning ordinances that penetrate so deeply as this one does into the internal composition of a single housekeeping unit. Until it has done so, we are of the opinion that we should not read the general authority that it has delegated to attend so

the extent to which zoning ordinances can permissibly interfere with a property owner's right to determine the internal composition of his or her household.⁶⁵ Although a municipality may want to prevent overcrowding and traffic congestion, Stewart determined that attacking these problems by restricting household composition was using a means not reasonably related to achieving the desired ends.⁶⁶ He noted that trying to solve these problems by using a restrictive definition of family was "like burn[ing] the house to roast the pig."⁶⁷ To be a valid exercise of its police power, a municipality must use more direct means to resolve problems of overcrowding and traffic congestion.

The Supreme Court's decisions in *Euclid*, *Belle Terre*, and *Moore* delineate municipalities' authority to establish single-family neighborhoods. In order for a zoning ordinance to be valid under the federal constitution, it must not impinge on the right of traditional nuclear and extended families to live together. The *Belle Terre* decision does indicate that municipalities can constitutionally exclude unrelated individuals from single-family neighborhoods, although it does not directly address whether alternative families can be excluded also. The dissenting and concurring decisions in *Belle Terre* and *East Cleveland*, respectively, lay out constitutional arguments useful to alternative families trying to specifically obtain the right to live in single-family neighborhoods with traditional nuclear and extended families.

B. Lower Court Cases Extending Protections to Alternative Families.

Lower court cases, both before and after *Belle Terre* and *Moore*, have specifically granted alternative families the right to live in single-family neighborhoods. These cases have struck down zoning ordinances that restricted single-family neighborhoods to families related by blood, marriage or adoption or limited numbers of unrelated individuals. Careful

far.

Id. at 436-38, 216 N.E.2d at 119-120.

In the other case, the New Jersey Supreme Court considered overturning a zoning ordinance that attempted to address problems of excessive noise, overcrowding, intoxication and wild parties by prohibiting summer rentals to unrelated individuals. In *Kirsch Holding Company v. Borough of Marasquan*, 59 N.J. 241, 251 n.6, 281 A.2d 513, 518 n.6 (1971) the court held that:

Until compelled to do so by a New Jersey precedent squarely on point, this court will not conclude that persons who have economic or personal reasons for living together as a *bona fide* single housekeeping unit and who have no other orientation, commit a zoning violation, with possible penal consequences, just because they are not related.

65. *Moore*, 431 U.S. at 518-519.

66. Id. at 520 n.16.

67. Id. citing *Larson v. Mayor*, 99 N.J. Super. 365, 374, 240 A.2d 31, 36 (1968). For a detailed discussion of pre-*Belle Terre* state cases, See, Note, *Burning the House to Roast the Pig: Unrelated Individuals and Single Family Zoning's Blood Relation Criterion*, 58 Cornell L. Rev. 138 (1972).

examination of these cases establishes why alternative families in some states have gained the same right as traditional families to live in single-family neighborhoods. The first case discussed bases its decision on federal constitutional rights; the last three cases presented base their decisions on state constitutional rights.

Before the Supreme Court's decision in *Belle Terre*, the Eastern District Court of Wisconsin, in *Timberlake v. Kenkel*,⁶⁸ held that a zoning ordinance restricting single-family neighborhoods to traditional families or two unrelated persons over 62 violated the due process clause of the 14th Amendment. Although *Timberlake* was implicitly overruled by the Supreme Court's *Belle Terre* decision, its discussion of protections based on the equal protection clause of the 14th Amendment is persuasive in questioning the applicability of *Belle Terre* to situations where alternative families are excluded from single-family neighborhoods.

In *Timberlake*, two married couples and their children, who were unrelated by blood or marriage, challenged a Village of Shorewood zoning ordinance which prohibited them from living together. The Village's zoning ordinance defined a "family" as "an individual, or 2 or more persons related by blood, marriage or legal adoption, or a group of not more than 3 persons who need not be related by blood, marriage or legal adoption, living together in a dwelling unit."⁶⁹ The plaintiffs claimed that this family definition violated their right to equal protection under the 14th Amendment because it denied them the right to live together while allowing similarly situated families related by blood, marriage or adoption to live together.

The court first determined that neither a suspect classification nor a fundamental interest was involved, and thus the question was whether the legislative distinction between related and unrelated individuals was arbitrary and without a rational relationship to a legitimate legislative objective.⁷⁰ It went on to note that the equal protection clause requires all legislative classifications to rest on some difference having a fair and substantial relation to the legislation's objectives so that all similarly situated persons were treated alike.⁷¹ In claiming that its distinction between related and unrelated individuals was constitutional, the Village asserted that the ordinance was rationally related to the legitimate goals of (1) preserving the residential nature of the Village, (2) preserving the Village's residential property values, and (3) establishing population density control.⁷² The court interpreted the Village's asserted goals to be based on

68. 369 F. Supp. 456, 458 (E.D. WI 1974).

69. Id. at 458-459.

70. Id. at 464.

71. Id. at 464-65.

72. Id. at 465. The court rejected the Village's assertion that a fourth goal of preserving the Village's high moral character existed because the Village did not seriously argue that single-family housing as defined by the ordinance preserved the high moral character of the community. Id. This goal, however, is one municipalities frequently assert and

three assumptions: (1) that single families were more likely than voluntary families to preserve the residential character of the Village; (2) that single families were more likely than voluntary families to preserve residential property values in the Village; and (3) that single families were more likely than voluntary families to be smaller in size and therefore control population density.⁷³

The court stated that its analysis was guided by *United States Dept. of Agriculture v. Moreno*⁷⁴ in which the Supreme Court held that section 3(e) of the Food Stamp Act was unconstitutional because it differentiated between two classes of households, one composed of individuals related to each other and the other composed of individuals unrelated to each other. The *Moreno* Court held that "this distinction between 'related' and 'unrelated' persons [is] wholly without any rational basis and therefore [is] invalid under the due process clause of the Fifth Amendment."⁷⁵ By using the *Moreno* analysis, the *Timberlake* court determined that the zoning ordinance, which also differentiated between related and unrelated persons, was without any rational basis and was therefore unconstitutional.⁷⁶

The court, after examining other sections of the ordinance and after examining each of the Village's asserted goals, held that no rational basis existed for the ordinance and that less onerous means could be used to achieve the Village's goals.⁷⁷ After referring to other sections of the zoning ordinance, the court determined that the Village could use those sections, rather than single-family zoning, to attain its goals of preserving residential character, property values, and population density control.⁷⁸ The court carefully considered the assumptions behind the Village's goals and noted that the Village had not presented any evidence substantiating its assumptions.⁷⁹ Without any evidence to substantiate the assumptions, the

courts handling these cases should, like the *Timberlake* court, require evidentiary substantiation before accepting the assertion.

73. *Id.* The court used the term "voluntary families" to refer to families which were unrelated by blood, marriage or adoption.

74. 413 U.S. 528 (1973). *See, supra* fn. 51.

75. *Timberlake*, 369 F. Supp. at 466.

76. *Id.*

77. *Id.* at 467.

78. *Id.* at 466. It referred to sections that prohibited erection of coops or pens for animals; prohibited rooming houses, filling stations, businesses, churches or other commercial buildings; and required large lots, single dwellings on lots and height regulations. These sections, the court stated, more directly achieved the stated goals than did the "family" definition contained in the zoning ordinance. *Id.*

79. *Id.* at 467. First, the Village's view that voluntary families would not preserve the residential character of the community was based on speculation and not supported by evidence. The court stated that the set-back requirements, size of lot and building height regulations were more rationally related to preserving residential character than was the restrictive family definition. Second, the Village's assertion that the restrictive family definition provided a stable community of citizens which prevented inflated property values and inflated rentals was also based on speculation and not supported by the evidence. Finally, the Village's contention that the restrictive family definition was necessary to control population density was also not supported by the evidence. The court noted that the

court reasoned that the Village was merely speculating that the restrictive family definition would help it to achieve its goals.⁸⁰

The *Timberlake* decision is an excellent example of how the Supreme Court could have decided the *Belle Terre* case using a federal constitutional analysis. It may also indicate how the Supreme Court might decide a future case that raised the issue of whether alternative families, as opposed to unrelated individuals, can be constitutionally zoned out of single-family neighborhoods.

In cases following the Supreme Court's decision in *Belle Terre*, state courts declaring zoning ordinances unconstitutional due to their restrictive definition of family have turned to bases other than the federal constitution for their legal support. Usually, they have turned to the due process clause or the privacy clause in their own state constitutions. Three examples of state courts using state constitutions to overturn restrictive family definitions in zoning ordinances are *Charter Township of Delta v. Dinolfo*,⁸¹ *McMinn v. Town of Oyster Bay*,⁸² and *City of Santa Barbara v. Adamson*.⁸³ Examining these cases shows how state courts have rejected the reasoning behind the *Belle Terre* decision and have concluded that alternative families, like traditional families, have a constitutional right to live together in single-family neighborhoods.⁸⁴

In *Charter Township*, the zoning ordinance prohibited the defendants from including six unrelated individuals in their households. Each household consisted of a husband and wife, children, and six unrelated adults. They were members of The Work of Christ Community and they adopted their lifestyle as a means of living out their Christian commitment.⁸⁵ While agreeing with the Township that ensuring the neighborhood's residential nature was a permissible object for a zoning ordinance, the court determined that the ordinance did not further that goal and it rejected the Township's assumption that different, and undesirable, behavior could be expected from a functional family as opposed to a traditional family.⁸⁶

The court stressed that using the traditional family for determining permissive occupancy was both overinclusive and underinclusive.

The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be

ordinance's limit of three unrelated individuals was actually lower than the size of the average nuclear family. *Id.*

80. *Id.*

81. 419 Mich. 253, 351 N.W.2d 831 (1984).

82. 66 N.Y.2d 544, 498 N.Y.S.2d 128, 488 N.E.2d 1240 (1985).

83. 164 Cal. Rptr. 539, 610 P.2d 436 (1980).

84. *See, also*, *State v. Baker*, 81 N.J. 99, 405 A.2d 369 (1979).

85. *Charter Township*, 419 Mich. at 253, 351 N.W.2d at 834.

86. *Id.* at 270-271, 351 N.W.2d at 841. The court referred to the unrelated individuals in the households as a functional family.

achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. Plainfield's ordinance, for example, would prohibit a group of five unrelated widows, widowers, older spinsters or bachelors—or even of judges from residing in a single unit within the municipality On the other hand, a group of ten distant cousins could so reside without violating the ordinance. Thus the ordinance distinguishes between acceptable and prohibited uses on grounds which may, in many cases, have no rational relationship to the problem sought to be ameliorated.⁸⁷ (footnotes omitted)

The Township responded by arguing that it had no interest in keeping a certain group of unrelated persons together while it did have a clear interest in preserving the integrity of the biological or legal family.⁸⁸ While agreeing that the Township had no particular interest in keeping a group of unrelated individuals together, the court noted that it also had no business keeping them apart absent a valid reason for doing so.⁸⁹ The Township did not establish that “unrelated persons, as such, have any less a need for the advantages of residential living or that they have as a group behavior patterns that are more opprobrious than the population at large.”⁹⁰ Without such evidence, the ordinance was arbitrary and capricious under the due process clause of the Michigan Constitution.⁹¹

The court referred to other zoning ordinances which offered innovative approaches to preserving the family character of a neighborhood without arbitrarily excluding groups not inimical to that goal. It cited an ordinance which described “family” as:

- a. One or more persons related by blood or marriage occupying a dwelling unit and living as a single, nonprofit housekeeping unit.
- b. A collective number of individuals living together in one house under one head, whose relationship is of a permanent distinct domestic character, and cooking as a single housekeeping unit. This definition shall not include any society, club, fraternity, sorority, association, lodge, combine, federation, group, coterie, or organization, which is not a recognized religious order, nor include a group of individuals whose association is temporary and resort-seasonal in character or nature.⁹²

The court also referred to an ordinance that defined “family” as:

“a single individual doing his [or her] own cooking and living upon the premises as a separate housekeeping unit, or a collective body of persons

87. *Id.* at 274, 351 N.W.2d at 842. The court also noted “twenty male cousins could live together, motorcycles, noise and all, while three unrelated clerics could not.” *Id.*

88. *Id.* citing *Town of Durham v. White Enterprises Inc.*, 115 N.H. 645, 649, 348 A.2d 706, 709 (1975).

89. *Charter Township*, 419 Mich. at 274-275, 351 N.W.2d at 842.

90. *Id.* at 275, 351 N.W.2d at 842.

91. *Id.*

92. *Id.* at 278 n.7, 351 N.W.2d at 844 citing *Kirsch Holding Co. v. Borough of Manesquan*, 59 N.J. 241, 247, 281 A.2d 513, 516 (1971).

doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel."⁹³

These ordinances would meet a municipality's need for establishing residential neighborhoods without prohibiting alternative families from living in those neighborhoods. The court held that the zoning ordinance's "family" definition violated the Michigan Constitution's due process clause because it limited household composition in a manner not rationally related to its stated goals.⁹⁴

In a similar and more recent case, the New York Court of Appeals reached the same result in *McMinn v. Town of Oyster Bay*.⁹⁵ In that case, the plaintiffs were owners and tenants of a four bedroom house who were cited for violating Oyster Bay's zoning ordinance. The zoning ordinance restricted single family housing to any number of persons related by blood, marriage or adoption or to two persons not so related but who were 62 or older.⁹⁶ The court held that the ordinance, on its face, violated the due process and equal protection clauses of the New York constitution, as well as New York's Human Rights Law.⁹⁷

The court laid out a two-prong test for determining whether a zoning ordinance is a valid exercise of the police power: (1) it must have been enacted in furtherance of a legitimate governmental purpose, and (2) there must be a "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end."⁹⁸ If the ordinance failed either part of the test, it was unreasonable and constituted a deprivation of property without the due process of law.⁹⁹

93. Charter Township, 419 Mich. at 278 n.7, 351 N.W.2d at 844 citing *Penobscot Area Housing Development Corp. v. City of Brewer*, 434 A.2d 14, 20 (Me. 1981).

94. Charter Township at 278, 351 N.W.2d at 844. In response to the Dinolfo decision, East Lansing, Michigan began studying its zoning ordinance to ensure that it was constitutional. After obtaining advice from its City Attorney that the ordinance only had to allow functional families, not all unrelated individuals, to live in single-family neighborhoods, the Planning Commission adopted a draft ordinance defining functional families. That definition stated: "Functional family shall mean a group of persons other than a family occupying a dwelling as a single, non-profit housekeeping unit, whose relationship is of permanent and distinct domestic character and who shares common culinary facilities. Functional family shall not include any fraternity, sorority, cooperative, club, society, association, lodge, organization, boarders, lodgers, roomers or foster care home nor shall it include any group of persons whose association is merely temporary, social, politically commercial or economic in nature." See, Task Force Report, *supra* fn. 1, at section G, pages 2-16.

95. 66 N.Y.2d 544, 498 N.Y.S.2d 128, 488 N.E.2d 1240 (1985).

96. Id. at 546-47, 498 N.Y.S.2d at 129, 488 N.E.2d at 1241.

97. Id. at 549, 498 N.Y.S.2d at 130, 488 N.E.2d at 1241.

98. Id. at 548-549, 498 N.Y.S.2d at 130, 488 N.E.2d at 1242. The court began its examination of the zoning ordinance by noting that ordinances, like all other legislative enactments, are presumed to be constitutional and the party challenging the ordinance has the burden to prove its unconstitutionality beyond a reasonable doubt. Id.

99. Id. at 549, 498 N.Y.S.2d at 130, 488 N.E.2d at 1243.

The court found that the ordinance was enacted to further several legitimate governmental purposes, including preserving the character of traditional single-family neighborhoods, reducing parking and traffic problems, controlling population density and preventing noise and disturbances.¹⁰⁰ However, the question in the case centered on whether the means chosen by Oyster Bay were reasonably related to achieving the ordinance's ends. The court concluded that they were not.¹⁰¹

The court held that "restricting occupancy of single-family housing based generally on the biological or legal relationships between its inhabitants bears no reasonable relationship to the goals" of the ordinance.¹⁰²

Zoning is 'intended to control types of housing and living and not the genetic or intimate internal family relations of human beings' . . . and if a household is 'the functional and factual equivalent of a natural family' . . . the ordinance may not exclude it from a single-family neighborhood and still serve a valid purpose.¹⁰³

According to the court, zoning ordinances can constitutionally restrict the definition of "family" to include various circumstances and relationships only if the ordinance also contains an alternative definition of family to cover any number of unrelated persons living together who are the functional equivalent of a traditional family.¹⁰⁴

Thus the New York State Constitution requires that unrelated individuals who are a functional equivalent of the traditional family must be treated the same as a traditional family under zoning ordinances.¹⁰⁵ Alternative families have a state constitutional right to share single-family neighborhoods with traditional families. Zoning ordinances which try to exclude those alternative families will be declared unconstitutional.

The California Constitution also protects alternative families. However, the basis for this protection flows from its newly-enacted privacy clause, not from the due process or equal protection clauses as in Michigan and New York. In *City of Santa Barbara v. Adamson*, the California

100. *Id.* at 549, 498 N.Y.S.2d at 131, 488 N.E.2d at 1243. *See, also*, Annotation, *Validity of Ordinance Restricting Number of Unrelated Persons Who Can Live Together in Residential Zone*, 12 A.L.R. 4th 238 (1976).

101. *McMinn*, 66 N.Y.2d at 549, 498 N.Y.S.2d at 131, 488 N.E.2d at 1243.

102. *Id.* The court pointed out that the goals of the ordinance could be achieved by restrictions on the size of the dwelling and the lot and the number of people occupying it and the ordinance, as written, was both over inclusive and under inclusive. *Id.*

103. *Id.* *citing* *Group House of Port Washington, Inc. v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 272-273, 408 N.Y.S.2d 377, 380, 380 N.E.2d 207, 210 (1978) and *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305, 357 N.Y.S.2d 449, 452, 313 N.E.2d 756, 758 (1974).

104. *McMinn*, 66 N.Y.2d at 549-50, 498 N.Y.S.2d at 131, 488 N.E.2d at 1244. The functional equivalent of a traditional family exhibits some of the following indicia: permanent and not transient arrangement; intention to remain and develop ties in the community; stable, uncongested environment; and maintenance of a single housekeeping unit. *City of White Plains*, 34 N.Y.2d at 305-6, 357 N.Y.S.2d at 452-53, 313 N.E.2d at 757-58.

105. *McMinn*, 66 N.Y.2d at 550, 498 N.Y.S.2d at 131-32, 488 N.E.2d at 1244.

Supreme Court held that the California Constitution's privacy right prohibited zoning ordinances restricting the number of unrelated individuals living together as an "alternate family" in a single-family neighborhood while not equally restricting traditional families.¹⁰⁶

The Appellants were three of twelve adult residents living in a 24-room, 10-bedroom, 6-bathroom house in a single-family neighborhood. They considered themselves to be an alternative family with social, economic and psychological commitments to each other. They shared expenses, rotated chores, ate evening meals together, shared recreational activities and contributed to improving the house. They functioned as a family because they shared "the same values and interactions as a traditional family: love, respect, unity and cohesiveness."¹⁰⁷ They were cited for violating Santa Barbara's zoning ordinance which defined "family" as individuals related by blood, marriage or adoption or not more than five unrelated persons.

As did the other decisions noted above, the court's inquiry began with a determination that the restrictive family definition was not justified by the city's interest in serving the public health, safety, comfort and general welfare.¹⁰⁸ The court specifically noted that "[i]n general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users."¹⁰⁹

The court held that the right to privacy under the California Constitution included the right of persons to make intimate life style decisions free from unnecessary government interference.¹¹⁰ In terms of a restrictive zoning ordinance, whether the right to privacy protected unrelated persons living in a single-family neighborhood depended on how closely they resembled a traditional family.¹¹¹ "The more closely the values pursued resemble those of a traditional family, the more likely the decision to live together will be protected by the right to privacy."¹¹²

The *Adamson* case is significant to alternative families because it ac-

106. 164 Cal. Rptr. 539, 610 P.2d 436 (1980). Although the Supreme Court referred to the appellants as an "alternate family", *Id.* at 541, 610 P.2d at 438, they will be referred to as an alternative family herein to remain consistent with the language used throughout. For an excellent discussion of the case and its position in the line of other California privacy decisions, see Note, *City of Santa Barbara v. Adamson; New Protection for Alternate Life Style Decisions*, 14 Loyola of L.A. L. Rev. 359 (1981). [hereinafter *Alternate Life Style*].

107. *Alternate Life Style* *supra* fn. 106 at 361 n.11.

108. *City of Santa Barbara*, 164 Cal. Rptr. at 543, 610 P.2d at 440. The court rejected, as illegitimate, any assumption behind the zoning ordinance that groups of unrelated persons cause an immoral environment for families with children. *Id.*

109. *Id.* at 544-45, 610 P.2d at 441-442.

110. *Alternate Life Style* *supra* fn. 106 at 359.

111. *Id.* at 371. Two factors to be used in determining whether unrelated individuals shared the characteristics of a family are whether the individuals have social, economic and psychological commitments to one another and whether emotional support and stability are provided to one another. *Id.*

112. *Id.*

knowledges that any number of unrelated individuals can be the functional equivalent of a traditional family if they have the same values and interactions that a traditional family has. Zoning ordinances, attempting to establish single-family neighborhoods, must address the needs and rights of alternative families to live in those neighborhoods. Alternative families, like traditional families, desire to live with other families where family values and family needs are supported. Those family values and needs, as the cases above establish, are not restricted to families related by blood, marriage or adoption. They extend to alternative families and alternative families demand access to them.

C. *Local Legislation to Expand Family Definitions in Zoning Ordinances*

While studying the possibility of enacting a Madison, Wisconsin, ordinance which would provide benefits to alternative families, expanding the zoning ordinance's family definition to include alternative families was one of the most controversial issues. Although such an expansion would not have any significant economic impact (as did the other controversial issue¹¹³), much concern was expressed by city council members and neighborhood associations about the possible negative effects of a broadened family definition.¹¹⁴ Any challenge to the current zoning ordinance that protects single-family neighborhoods from an onslaught of transient students with their accompanying parties, noise and cars was viewed as a serious threat to Madison's peaceful family neighborhoods.¹¹⁵

Once the proposed definition of an alternative family changed from the original recommendation of "two *or more* adults . . . plus dependents" to "two adults . . . plus dependents", the concerns of the council members and the neighborhood associations dropped. Those concerns centered on the problems associated with large student households and the parking and noise problems believed to travel with them. There did not seem to be a concern that an alternative family, as differentiated from unrelated college students, would move into the traditional family neighborhoods.

This may not be the typical response, however, from all communities. Many communities may hope, under the guise of objecting to noise or

113. The other controversial issue was extending employer-based family health insurance to alternative families. *See*, fns. 17 to 160, *infra*, and accompanying text.

114. Neighborhood associations in Madison are strong, vocal parts of the community and much work in renovating and maintaining family neighborhoods has come through neighborhood association activism. These associations and their members were particularly concerned that the alternative families ordinance would become a vehicle for student groups, whether fraternities, sororities, communes or student households, to spread into single-family neighborhoods from their traditional sites in "student ghettos".

115. *See*, Task Force Report, *supra* fn. 1 at section E, Minutes of February 23, 1984 meeting, pgs. 1-4; section H, pg 5 [Statement of Dungeon-Monroe Neighborhood Association]; pg. 10 [Letter from Greater Madison Board of Realtors, Inc.]; pg. 32 [letter from Madison Apartment Association]; and Section J, pgs. 51-53.

parking, that they can keep alternative families out of their neighborhoods and not have a different family-type next door. That these fears exist in some communities is evident from examining the zoning cases discussed above and should not be ignored or minimized.

Examination of the above zoning cases does establish, however, that the proposed Madison definition of an alternative family with its self-imposed limitation to "two adults plus dependents" falls woefully short of the possibilities to which it could aspire at least for the purposes of redefining "family" within the zoning ordinance. As the cases of *Kirsch Holding Company* and *Penobscot Area Housing* show,¹¹⁶ much broader definitions are possible which would expand the possible living situations available to alternative families with more than two adult members while still addressing the legitimate fears of all-night parties, non-existent parking spaces and transient populations. The proposed Madison ordinance takes a step toward ending discrimination against alternative families by expanding the zoning definition of "family" to include some alternative families, but it does not go as far as possible toward ending the prohibitions that affect all alternative families on a daily, hourly basis—their choice, and the restriction on that choice, of where to make their home.

III. Obtaining Traditional Family Employment Benefits for Alternative Families

In addition to challenging zoning ordinances which prohibit them from living in single-family neighborhoods, alternative families are also seeking those benefits normally connected with employment that traditional families regularly receive. These benefits include access to family health insurance coverage, parenting and bereavement leave, sick leave to care for a family member, pension benefits, recreational or day care benefits, moving expenses, and reduced travel costs. Alternative families are trying to obtain these benefits through litigation, legislation and collective bargaining.

These benefits are not simply "fringe" benefits. They often consist of up to forty percent of an employer's average personnel costs.¹¹⁷ Additionally, and perhaps more importantly for alternative families, receiving these benefits tends to make a family stronger, healthier and more stable.¹¹⁸ Receiving benefits allows the individual to acknowledge the importance of his or her family and to receive societal support and acknowledgement for that family.

Alternative families attempting to obtain these benefits may encounter employer and insurance companies concerns, as well as hostility from

116. See, *supra* fn. 82 and 83 and accompanying text.

117. Friend and Liberty, *Recognizing Lesbian and Gay Families: Strategies for Extending Employment Benefit Coverage*, 2 (Lesbian Rights Project, San Francisco, CA 1985) [hereinafter cited as Friend and Liberty].

118. *Id.* at 3.

citizen organizations not wanting to extend coverage to gay and lesbian families and unmarried heterosexual families. Employer concerns will center around two main issues: will the extension of benefits incur costs for the employer and will the extension of benefits require additional paperwork?¹¹⁹ The simple answer to both concerns is "yes." But the more complete answer is that it cannot be determined exactly how large the cost or paperwork will be for a given employer. It is impossible to accurately estimate the number of employees and families who would take advantage of these benefits and what increased costs would be involved. The increased cost from extending benefits to alternative families will vary substantially from employer to employer depending on the make-up of its employees' families and the percentage of employees who take advantage of the benefits. Current studies indicate, however, that the expected cost will range between 1 and 4 percent of the employer's overall cost of benefits.¹²⁰

Insurance company concerns are slightly more difficult to address.¹²¹

119. *Id.* at 14-15.

120. In a survey conducted by the Madison Equal Opportunities Commission, 2,204 City of Madison employees were given surveys in their paycheck envelopes. Twenty-six percent of the employees (568) returned the survey and ten percent of those (59) indicated that they were part of an alternative family. Of the 59 indicating they were alternative family members, 66% indicated they would apply for family group health insurance benefits if the benefits were available, 10% indicated they would not apply for such benefits, and 24% indicated they were uncertain. Based on an annual increased employer cost of \$1,338.36 for conversion of single insurance to family insurance and based on a range of from 24 employees (actual survey respondents requesting family benefits who currently had single insurance) to 91 employees (estimating 10% of total city workforce minus the 34 percent of them who did not want coverage and minus the 17 percent of them who were already covered by family insurance), the estimated increased cost to the City of Madison, as an employer, would range from .85% to 3.8% of its annual budget for health insurance. (1986 budget of \$3,759,000.00). *See*, Survey of City of Madison Employees, Madison Equal Opportunities Commission May 12, 1986.

121. While studying the extension of health insurance benefits to alternative families, the Madison E.O.C. mailed questionnaires to major insurance companies doing business in Wisconsin. Concerns expressed by insurance companies responding include: need for detailed criteria for alternative family membership, administrative problems in determining alternative family status, increased and perhaps prohibitive cost of providing coverage, adverse selection, increase in insurers' potential risk or exposure, question of whether favorable federal tax treatment of employer-contribution for alternative family members would be allowed and extent of alternative family members' rights for assignment of benefits and release of medical information. *See*, Survey Responses of Insurance Companies, Madison Equal Opportunities Commission, October 5, 1985-January 15, 1986.

In a discussion with the Madison Equal Opportunities Commission, representatives from the State of Wisconsin Commissioner of Insurance raised concerns about obtaining the detailed claims experience insurance companies use for rate-setting, need for a separate rate structure for alternative families until claim experience can be analyzed, AIDS or other "lifestyle" factors that might affect claims, adverse selection, and possible state or federal preemption. The representatives indicated that, although insurance companies may tend to resist coverage of alternative families, "blind" prejudice would probably not be a concern. They also indicated a belief that most insurance companies would not refuse to provide coverage to currently-covered employers just to void providing alternative family

An insurance company's main goal is usually clear—maintaining an acceptable profit margin.¹²² However, maintaining this profit margin is based on two major factors: avoiding adverse selection and avoiding fraudulent claims.¹²³ Adverse selection occurs when insurance beneficiaries are chosen because they are sick, not because of some objective criteria.¹²⁴ Marriage has provided a convenient basis by which an insurance company can extend coverage, and avoid adverse selection, because of the belief that few persons would marry simply to obtain insurance coverage.¹²⁵ Adverse selection could occur if employees could designate any beneficiary under his or her health insurance policy. Thus, for example, insurance companies fear that an employee with a very ill cousin and a healthy partner would choose to cover the cousin whose health insurance costs would be substantially higher than the partner's costs would be.¹²⁶ Before extending health insurance coverage, insurance companies would want to determine that the beneficiary designation was based on some objective criteria, usu-

coverage. See, Task Force Report, section M, pgs. 1-2. One insurance company surveyed did state, however, if premium costs increased substantially from providing coverage to alternative families, it may no longer be able to offer insurance coverage to employers within Madison. Id.

122. Friend and Liberty, *supra* fn. 117, at 16.

123. Id.

124. Sexual Orientation and the Law § 5.04[1][d][ii] (R. Achtenberg, ed. 1985) [hereinafter referred to as Achtenberg].

125. Id. It is possible that unmarried heterosexual couples may decide to marry to obtain benefits since they are already living together as an alternative family. Bruce Hellmich of the North Farm Cooperative in Madison, a wholesale natural foods warehouse, testified that a male employee had requested insurance coverage for his unmarried female partner. North Farm's insurer refused coverage because the couple was unmarried; thereafter the couple did marry and insurance coverage was provided. See, Task Force Report, *supra* fn. 1 at section E, minutes of June 21, 1984, p.1. Thus, providing benefits to alternative families would eliminate this reason for marrying, a positive step toward ending marriages based on convenience or receiving benefits.

126. Under the original Madison task force's definition, there was the additional fear that, with an unlimited number of adults able to register as an alternative family, each employee could potentially cover an unlimited number of adults under his or her employer's insurance policy. There were fears of 20 adults joining together as a family simply to take advantage of one member's insurance benefits. See, Task Force Report, *supra* fn. 1, at Section E, Minutes of June 21, 1984. The task force addressed this fear by limiting the extension of employer-based benefits to one "spouse equivalent" plus children which would correlate to the traditional nuclear family. However, if family size were unrestricted by the number of adults, adverse selection could still result because the designated "spouse equivalent" could be the family member with the highest health costs. This concern is one of the reasons that the Madison EOC changed its alternative family definition to include only "two adults . . . plus dependents" so that adverse selection presumably could not occur. An additional safeguard would exist if, upon registration, alternative family members were required to sign an affidavit stating that the adults were in a mutually supportive committed relationship and stating that fraud charges could be brought if the registrants established family based, for example, not on mutual support and commitment, but rather on one member's need to obtain health insurance benefits. The City of Berkeley Affidavit of Domestic Partnership includes this type of provision. Friend and Liberty, *supra* fn. 117, at A-1.

ally mutual support and commitment, other than health.¹²⁷ They may possibly increase rates for alternative family coverage until they could determine, through actuarial studies and claims experience, whether alternative families were more expensive to insure than traditional families.¹²⁸

In addition to employer and insurance companies concerns which relate directly to the cost and administration of providing benefits, certain individuals, groups and organizations will probably object on moral grounds to extending traditional family benefits to alternative families. These objections will relate to whether it is morally appropriate or socially responsible to extend benefits beyond traditional families. Objections will probably be based on the historical oppression of gay men and lesbians;¹²⁹ the perceived need to protect the traditional family from additional threats, especially considering the increasing divorce rate;¹³⁰ and the concern that the individuals living in these families do not abide by fundamentalist Christian values requiring the family to consist only of heterosexual couples joined together by religious blessings at marriage along with their children. These objections are raised fervently and supporters of these ideas are often able to arouse substantial community support for their beliefs.¹³¹ Depending on the community involved, it may be possible

127. *Id.* at 16.

128. Rick Koven of Worker's Trust indicated that the company has not researched their claims to determine whether alternative families ask more than traditional families to insure. He said that it was his opinion that such research would show very little difference in the cost to insure alternative families but cautioned that his opinion was not backed by any empirical research. Telephone conversation with Rick Koven on March 11, 1987.

129. *See, Bowers v. Hardwick, supra* fn. 25.

130. The divorce rate in the United States was about forty percent (40%) according to U.S. Bureau of Census statistics in 1979. *Loss of Consortium, supra* fn. 7, at 513 n.12. According to Weitzman, the current divorce rate is at least forty-eight percent (48%) and may actually be significantly higher. Weitzman, *supra* fn. 6, at 4-5.

131. During its study of the alternative family rights ordinance, the Madison E.O.C. received substantial testimony from individuals objecting to the ordinances on moral or religious grounds. Excerpts from that testimony are reprinted below:

I would like to speak against this legislation which you are trying to push through. I am a Christian which I am not ashamed of. I am sorry for those that don't believe in what God in His word about man and women had said. 'They are to marry.' Genesis 2:24 . . . This is what we would call a family. So I am against anything or anyone that wants to change that . . . And why should we have two men and children, or two women and children, living together calling themselves families . . . So let's not do away with the American family which has made America what it is or was . . .

[Testimony of Francis Cutler, Task Force Report, *supra* fn. 1 at section E, minutes of October 18, 1984, p. 1]

If this [ordinance] passes, what we know now as family, as men and women and children, is going to be a mess because in the word of God, 'man and woman should leave their father and mother and cleave together and be of one flesh.' It says also in Genesis, 'be fruitful and multiply.' Two men or two women cannot do that. They can't have children . . . I believe this should not pass and that is morally wrong . . .

to directly address these objections and attempt to win the battle for favorable public opinion by pointing out that fairness and equity require the extension of benefits and morality-based religious beliefs should not be allowed to deflect from the need of alternative families to obtain these benefits.¹³²

By looking at the historical basis for extending employment benefits to traditional families and by looking at the current attempts and successes in obtaining benefits for alternative families through litigation, legislation

[Testimony of Jeanette Williams, Id. at 2.]

Now, I see this proposed ordinance another step in the breakdown of [the marriage] commitment and of that kind of true responsibility between one another. What people seem to be looking for is really a much easier way out of a relationship and more of a way not to be committed under the guise of being committed, and that they still want all the benefits that come from committed relationships.

[Testimony of Ted Geier, Task force Report, *supra* fn. 1 at section J, pgs. 5-6.]

[W]e must keep the political sanction in this nation such that we will keep our society primarily composed of nuclear families . . . I definitely believe that the sanction in our society and in our nation must stay with the traditional nuclear family, otherwise I see that the stability of nonnuclear relationships is in the majority of instances is not very stable . . . And I believe the stability of our society is resting on whether or not the primary relationships in our nation are going to be based on a marriage commitment or not. I would definitely urge you not to go ahead with this sort of legislation because I believe it is detrimental to our city, state, and our whole nation, to our society.

[Testimony of Derek Miller, Id. at 22-24].

Tradition has taught me that it takes a male and a female to make babies and babies make a family. Without a traditional male and female family unit in the United States, I don't see where this legislation should even be addressing the issue of family, because a family will not exist where there is no way to produce a family . . . I say if you want to see a peaceful society, I say, I'm in opposition to this, and I say get back to the basic family and let's see the nation get back on its feet.

[Testimony of Jay Punston, Id. at 48.]

132. Friend and Liberty point out two basic approaches or philosophies behind extending benefit coverage to alternative family members. (They refer only to gay and lesbian couples but for purposes of this article, the same philosophies exist for extending coverage to all alternative families). The "comparable or equal pay" analysis is relatively straightforward: when traditional family members are given certain benefits, alternative family members should receive the same benefits. Otherwise, alternative family members will be receiving less overall compensation than their traditional family co-workers. When one considers that some traditional family members receive substantial benefits including health and dental insurance, sick leave and bereavement leave, use of health or recreational facilities, pension benefits, and moving expenses, it becomes clear that alternative family members, doing exactly the same job, receive significantly less compensation.

The "purpose of the benefit" analysis focuses on the reasons certain types of employment benefits are provided. If benefits are provided to keep employees happy and productive, encourage them to remain with the company, allow them to meet their family commitments or reward them for work well done, there is no reason to provide these benefits only to employees who are also traditional family members. The same reasons to provide benefits apply equally to alternative family members and thus benefits should be extended to them. Friend and Liberty, *supra* fn. 117, at pgs. 7-8.

and collective bargaining, it will be easier to understand the importance alternative families place on extension of these benefits. It will also become clear why, until these benefits are obtained, real justice and equality among traditional families and alternative families will not exist.

A. A Historical Understanding of Employment-based Traditional Family Benefits

Before World War II, employment benefits did not generally extend to coverage of an employee's family members.¹³³ These family members were not employees and were not eligible for health insurance coverage under group plans.¹³⁴ After World War II, union influence increased and employees grouped together to demand insurance coverage for their families.¹³⁵ Family health insurance coverage was, and still is, prohibitively expensive for a family to purchase on its own, especially when compared to the relatively minor expense when family health insurance is available at group rates from a large employer.¹³⁶ But due to the number of employees who were in traditional families and due to their power to pressure employers into providing this benefit, many traditional families are now covered by group health insurance.

133. *Id.* at 5.

134. *Id.*

135. *Id.*

136. The inequity which results from denying employer group health insurance coverage for employees' alternative families can be seen from the following example. If a single alternative family consisting of a man, woman and their two children wanted to obtain health insurance through one of the local health maintenance organizations (HMOs) in Madison, Wisconsin, it would cost that family between \$185.16 and \$198.99 for the monthly premium as of January, 1987. Obtaining even more extensive health insurance coverage from the same HMOs as a University of Wisconsin employee would cost that family no monthly premium at all. On an annual basis, the increased cost to the family for having to obtain nonemployment-based health insurance would be between \$2211.92 and \$2387.88 for the 1987 calendar year. (This example does not address the question of whether the family would be able to obtain insurance coverage for their alternative family or the additional cost that would result if it became necessary for one of the adults to obtain single coverage while the other obtained family coverage for him or herself and their two children.)

Many employees are unable to receive this significant employment benefit simply because they live in an alternative family rather than a traditional family. In addition to the \$2200 to \$2400 yearly additional cost they must pay to insure their families, they also lose a significant employment benefit. In the situation described above, the University of Wisconsin pays approximately \$190.00 in monthly health insurance premiums for every employee insuring his or her traditional family. This results in a \$2280 yearly additional benefit that the traditional family member employee receives. The alternative family member employee is denied that significant benefit from the same employer.

For the employee in this situation, living in an alternative family results in a net cost of \$4700 on an annual basis. This blatantly unequal treatment results simply from the employee's inability to insure his or her family through the employer's group health insurance plan. Extending group health insurance benefits to alternative families is the only way to remedy this inequity.

However, the family structure has changed since World War II and the typical family is no longer composed of a wage-earning spouse, a financially dependent spouse, and children. For many families, two wage-earner households are the norm¹³⁷ and for others, family arrangements are no longer based on marriage, the usual criteria for obtaining employer-based health insurance benefits. Contrary to arguments put forward by some employers, insurance companies and fundamentalist groups, it is historically inaccurate to contend that employers originally extended benefits to traditional families in an attempt to support traditional families and promote marriage.¹³⁸ Employers extended these benefits because employees, who were members of traditional families, fought for and won the benefits. Employers will be required to extend benefits in the future to alternative families because employees who are members of alternative families are fighting for and beginning to win these traditional family benefits.

B. *Current Availability of Alternative Family Benefits*

Alternative family benefits are presently available from a limited number of employers, organizations and municipalities. Currently, two insurance companies have been offering insurance benefits to alternative families and other self-insurance plans are also being offered by some employers.¹³⁹ Each plan specifies eligibility criteria for alternative family

137. In 1970, seventeen percent of American wives worked outside the home. By 1990, sixty-seven percent of all wives will be in the labor force. Weitzman, *supra* fn. 6, at 6.

138. Friend and Liberty, *supra* fn. 117, at 6.

139. The Workers Trust Company offers basic health insurance, major medical coverage and life insurance to over 200 employers in the United States. Workers Trust is a member-owned, cooperative run, nonprofit business offering insurance coverage to individuals and democratically-run, progressive organizations. Until October 1986, its major medical coverage was underwritten by Consumers United Insurance Company. At that time, its underwriter was changed to Lincoln National Insurance Company. When this change was made, Lincoln National refused to continue providing insurance to alternative families. See, *infra*, fn. 140. Also, Liberty Mutual Insurance Company offers major medical, hospital indemnity, accident and life insurance. Coverage provided by Liberty Mutual is available through the American Psychological Association. Additionally, District 65 of the United Auto Workers acts as a self-insured carrier for its members employed by the *Village Voice* newspaper in New York City. Its coverage includes health, dental, disability and life insurance. *Id.* at 34-36. The National Organization for Women also offers insurance coverage to alternative family members. Rivera, *supra* fn. 8, at 391 n. 769.

members.¹⁴⁰ In December, 1984, the City of Berkeley became the first municipality to provide benefits to its employees' "domestic partners."¹⁴¹

These employers, organizations and municipalities understand that coverage is needed by a growing number of alternative families and their experience in extending coverage will provide much-needed information to other employers or groups considering an extension of benefits. Their experience with costs and actuarial information could provide reassurance to other employers and insurance companies whose fears of adverse selection or fraudulent claims presently keep them from providing similar coverage.¹⁴²

140. For example, until October 1986, Workers' Trust extended coverage to the "named partner" of an employee member who "permanently resides with the member in the member's home and to the member's and named partner's children." Coverage by Workers' Trust began after a three-month waiting period was met. Liberty Mutual is extending coverage to "spouse equivalents" of American Psychological Association members, during a three-year trial period which took effect in October, 1984. Spouse equivalents must be unmarried, at least 21 years old, share the domicile of an unmarried insured member, provide proof of good health and meet a one-year waiting period. The Committee on Gay Concerns, which obtained the coverage through its efforts, is currently trying to use verification forms in lieu of the waiting period, a period which married members do not have to meet. The *Village Voice*, through its own self-insurance plan, provides coverage to the "spouse equivalent" of any employee. Spouse equivalents must have shared households for one year before coverage begins; married couples do not have any waiting period before coverage begins. The Berkeley School Board extends benefits to the "domestic partners" of its employees and all their dependents. On August 1, 1984, the School Board began providing dental, bereavement and maternity/paternity leaves to its employees and their domestic partners. The extension of medical benefits is currently being negotiated with the Board's insurance carriers. Friend and Liberty, *supra* fn. 117, at 35-39.

141. (Since that time, the City of West Hollywood has also extended coverage to its employees.) In order to obtain domestic partner benefits, City of Berkeley employees and their domestic partners must sign an "Affidavit of Domestic Partnership." The affidavit states that the domestic partners reside together and share the common necessities of life, are not married to anyone, are at least 18 years old, do not violate California consanguinity laws, are each other's sole domestic partner, and are responsible for one another's common welfare. In addition, the partners agree to notify the City within 30 days of any change in their domestic partnership by filing a "Statement of Termination of Domestic Partnership" and agreeing to mail a copy of the statement of termination to the other partner. The partners also must agree that any person, employer or company suffering a loss due to a false statement made in the affidavit may bring a civil action against the partners for payment of those losses, including reasonable attorney fees. The affidavit also notes that the City is to use the affidavit solely for determining domestic partnership benefits and that the information contained in the affidavit is confidential and will not be released except by express authorization or under a court order. *Id.* at 39, A-1-A-3. As of December, 1986, one percent of Berkeley employees had signed up for alternative family medical insurance and four percent had signed up for alternative family dental insurance. (According to Barbara Lightner of the Madison Institute for Social Legislation, the difference in the number of employees signed up for the two coverages was due to the quality of the benefits involved. Conversation on November 26, 1986.)

142. For example, while discussing the possibility of extending alternative family benefits to City employees, Madison Mayor Joseph Sensenbrenner indicated that he would be interested in first finding out the City of Berkeley's experience with the number of

C. *Litigation Concerning Employment Benefits*

Employees, whose employers do not extend employment-related benefits to alternative family members, have begun using litigation in attempts to obtain these benefits. In the only published case to reach an appellate court system, Boyce Hinman and the Advocates for Gay and Lesbian State Employees brought a suit against the California Department of Personnel Administration claiming that family partners of gay men and lesbian state employees should be eligible to receive dental benefits.¹⁴³

Hinman argued that the state's eligibility requirements for benefits and its subsequent denial of benefits to the gay and lesbian employees' family members distinguished between similarly situated heterosexual families and homosexual families and thus violated the equal protection clause of the California Constitution.¹⁴⁴ However, the court held that Hinman was not similarly situated with regard to heterosexual employees with spouses, but rather was similarly situated with other unmarried employees.¹⁴⁵ According to the court, granting benefits based on marital status did not violate the fundamental rights of unmarried persons and therefore, statutory classifications based on marital status needed only to be rationally related to a legitimate state purpose to survive judicial scrutiny.¹⁴⁶

The court began by noting that the state has a legitimate interest in promoting marriage and that marriage is promoted by conferring rights or benefits to married persons which are unavailable to unmarried persons.¹⁴⁷ No similar public policy existed for promoting nonmarital relationships and, in the absence of legislation granting equal benefits to nonmarital relationships, no basis existed for extending to nonmarital relations the preferred status granted to marital relations.¹⁴⁸ The court also referred to the administrative difficulties that would result from requiring an administrative agency to decide which alternative family relationships

employees requesting benefits, the increased cost of providing benefits and their insurance claims experience before providing similar benefits to City employees. Author's discussion with Mayor Joseph Sensenbrenner, November, 1986 while requesting that city employee benefits for alternative families be added to the City's 1987 budget.

143. *Hinman v. Department of Personnel Administration*, 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (Ct. App. 1985), *review denied* August 15, 1985.

144. *Id.* at 526, 213 Cal. Rptr. at 416. The Court determined that the denial of benefits was not due to a classification based on sexual orientation, but rather was based on a marital status classification.

145. *Id.*

146. *Id.* at 526-527, 213 Cal. Rptr. at 416.

147. *Id.* at 527, 213 Cal. Rptr. at 417.

148. *Id.* This type of judicial refusal to expand the common law is an example of the importance of obtaining alternative family rights and an example demonstrating that broad-based success will not result from bringing individual lawsuits which try to persuade courts to extend benefits to alternative families. *See also*, fns. 179 to 181, *infra*, and accompanying text.

merited equal treatment with traditional families.¹⁴⁹ Finally, the court asserted that alternative family members' right to privacy would be invaded by having an administrative agency delve into their personal relationships to obtain the information necessary to indicate parity with traditional families.¹⁵⁰

The *Hinman* case illustrates a concern held by alternative family advocates. The court used the historical denial of benefits to alternative families and the historical state interest in promoting marriage as the basis for refusing to judicially extend benefits to alternative families. Although some courts are courageous enough to expand the common law when changing circumstances require such an extension for equitable reasons,¹⁵¹ most courts will refuse, as the *Hinman* court refused, to extend benefits without prior judicial precedent or legislative mandate. Because of this type of refusal, alternative family members seeking an extension of benefits may be better served by seeking the extension through state or local legislation or collective bargaining agreements.

Two other cases are pending in California courts awaiting further disposition. One is *Brinkin v. Southern Pacific Transportation*.¹⁵² In that case, Brinkin challenged Southern Pacific Railroad's, his employer, denial of funeral leave for him at the death of his same-sex partner of eleven years. The funeral leave benefit was available to all married employees on the death of his or her spouse.¹⁵³ Brinkin argued that the denial of funeral leave benefits violated the California Constitution's privacy provision; the Fair Employment and Housing Act, which prohibits marital status discrimination; and the San Francisco Police Code which prohibits sexual orientation discrimination.¹⁵⁴

The other case is *Chamberlin v. Frontier Airlines, Inc.*¹⁵⁵ In that case, Allen Chamberlin requested that reduced air fare benefits, available

149. Id. at 528, 213 Cal. Rptr. at 417.

150. Id. This type of information would include the length of the relationship; the eventual plans, if any, to marry; and the sincerity of the partners' commitment to one another. Id. The argument that requiring such information would violate the right to privacy is specious, at best, because alternative family members requesting benefits would be willing to provide such information or they would not apply for the benefits. Although providing this information requires more disclosure of personal information from alternative families than is required from traditional families, unless a registration system exists which confers alternative family status to specified relationships, no alternative presently exists than disclosure of such information.

151. See, fns. 179 to 181, *infra*, and accompanying text.

152. 572 F. Supp. 236 (N.D. Cal. 1983). The union, which opposed Brinkin's lawsuit, wanted the suit tried in federal court but the federal district court held that no federal jurisdiction existed and remanded the case to the Superior Court of San Francisco. (No. 796271 (Cal. Super. Ct. San Francisco City, filed June 29, 1972). See, Achtenberg, *supra* fn. 124, at § 5.04[1][a].

153. Id.

154. Friend and Liberty, *supra* fn. 117 at 43.

155. No. 310989 (Cal. Super. Ct., Sacramento County filed Dec. 22, 1983.) See, Achtenberg, *supra* note 124, at § 5.04[1][a].

to his co-workers' spouses and dependents, also be made available to his same-sex partner of ten years.¹⁵⁶ The airline denied his request and he filed suit. After Chamberlin filed a complaint with the Department of Fair Employment and Housing, his employer retaliated against him in numerous ways, including a five-week suspension.¹⁵⁷ In his suit, Chamberlin alleged that Frontier's actions violated his right to privacy under the California Constitution, violated the prohibition against marital status discrimination in the California Fair Employment and Housing Act, and violated the prohibition against sexual orientation discrimination in the San Francisco Police Code.¹⁵⁸ Frontier has been successful in having some of Chamberlin's claims dismissed and the parties are currently negotiating settlement on the remaining claims.¹⁵⁹ Frontier has since changed its policy on travel benefits to include some unmarried partners.¹⁶⁰

These cases show a willingness on the part of alternative family members to bring suits challenging their employers' restriction of employment-related benefits to traditional families. Because two of the cases are still pending, there is no clear expression of how the courts will decide these lawsuits and whether the plaintiffs will be successful in obtaining for alternative families the benefits that traditional families regularly receive.¹⁶¹ As noted before, the *Hinman* court's refusal to extend benefits to alternative family members indicates that state or local legislation or collective bargaining agreements may be the most successful way to obtain extension of benefits to alternative families.

D. Local Legislation Granting Employment Benefits

The cities of Berkeley and West Hollywood, California have extended employment-related benefits to city employees' domestic partners. In Berkeley, domestic partners of city employees are entitled to the same benefits that traditional family members receive.¹⁶² An attempt to obtain

156. *Id.*

157. Friend and Liberty, *supra* fn. 117, at 44-45.

158. Achtenberg, *supra* fn. 124, at § 5.04[i][a].

159. Friend and Liberty, *supra* fn. 117, at 45.

160. *Id.*

161. *See, also*, fns. 201 to 205, *infra*, and accompanying text on suits brought to compel workers' compensation death benefits and fns. 194 to 200, *infra*, and accompanying text on suits to gain the right to sue for loss of consortium.

162. *See, supra*, fn. 8 which clarifies that these other ordinances apply to "domestic partners," defined as lesbian and gay couples, and not to other alternative families, such as unmarried heterosexual couples. The efforts of one man, Tom Brougham, were behind the 5 and ½ year fight to get "domestic partner" benefits. Brougham tried to sign his partner up for health benefits in August, 1979 but the city rejected his application. Brougham and the East Bay Lesbian/Gay Democratic Club held public forums, developed proposals and lobbied extensively for extension of benefits. In July, 1984, the City Council endorsed the concept of domestic partner benefits but voted not to implement the plan until 1986. In December, 1984, a new council voted to adopt a domestic partnership policy with immedi-

legislative implementation of domestic partners' benefits was unsuccessful in San Francisco.¹⁶³ Despite a negative reaction by the religious community and the city's health insurance carriers, the Board of Supervisors twice passed the legislation, only to have it vetoed both times by Mayor Dianne Feinstein.¹⁶⁴

The fight to obtain legislative extension of alternative family benefits is currently underway in Madison, Wisconsin. The Madison ordinance would extend benefits to any two adults and their dependents who are in a mutually supportive committed relationship and who register with the City Clerk as an alternative family.¹⁶⁵ The main difference between the Madison ordinance and most of the other enacted or proposed ordinances is that the other ordinances only extend benefits to the alternative family members of city employees. The Madison ordinance, on the other hand, would require all employers within the City of Madison to extend employment-related benefits, including family health insurance benefits, to all their employees who had registered as an alternative family with the City Clerk.¹⁶⁶ The E.O.C. considered eliminating this requirement because of the substantial impact it might have on small employers or those with a substantial number of alternative family members. At the urging of alternative family rights advocates, however, the E.O.C. agreed to send the ordinance, including employer health insurance coverage, to the Madison Common Council for action.

Other cities currently considering an ordinance to extend benefits to alternative families include Santa Cruz and Oakland, California, Minneapolis, Minnesota, and East Lansing, Michigan.¹⁶⁷ If all these cities extend benefits to alternative families, a strong grassroots movement will

ate implementation and now, the first domestic partners are registered and receiving benefits. Friend and Liberty, *supra* fn. 117, at 39-41, A-1-A-3.

163. In 1982, a "domestic partnership" ordinance was introduced to the San Francisco Board of Supervisors by Supervisor Harry Britt. The ordinance would have allowed domestic partners to register for certain benefits, including hospital and jail visitation. The response from various segments of the community opposing the extension of benefits was swift and vehement. *Id.* at 45-46.

164. *Id.*

165. The Madison Institute for Social Legislation (M.I.S.L.) brought its request for an alternative families' ordinance to the Madison Equal Opportunities Commission. The E.O.C. established a task force on alternative family rights in 1984 and the task force studied the desirability and feasibility of passing an alternative family rights ordinance for over two years. After the task force recommended adoption of the ordinance, the E.O.C. continued to study the proposed ordinance for an additional year. The E.O.C. recently approved the ordinance and sent it to the City Attorney's office for drafting where it remains at this time. *See, supra* fn. 1.

166. The Madison ordinance would also amend the zoning ordinance's definition of family to include alternative families (*see, supra* fns. 103 to 106 and accompanying text); would require hospitals to give alternative families the right to visitation and medical authorization (*see, infra*, fns. 202 to 204 and accompanying text); and would require public accommodations offering family memberships to offer such memberships to alternative families (*see, infra*, fns. 225 to 231 and accompanying text).

167. Friend and Liberty, *supra* fn. 117, at 49.

have begun to obtain protections and benefits for alternative family members.

E. *Collective Bargaining Efforts*

Attempts are also being made to extend benefits to alternative families through the collective bargaining process. Because this is the route by which traditional families first gained their employment-related benefits, it is conceivable that it will be the most successful way for alternative families to obtain similar benefits.¹⁶⁸ The collective bargaining process led to many of the benefit programs which are currently in existence.¹⁶⁹ Collective bargaining attempts to extend benefits are currently underway within the University of California system and within numerous unions in Madison, Wisconsin.¹⁷⁰

168. However, the collective bargaining process will not result in benefits for all alternative families because many employees are not unionized or will be unable to convince their union or their employer to extend these benefits through the collective bargaining process. Extension of benefits by some employers through the collective bargaining process, however, will make the concept of benefits for alternative families better understood and will probably lead to the continued extension of benefits on wider basis.

In situations where an employer does offer alternative family benefits to its employees who are unionized, it will most likely be a mandatory issue for bargaining. Conversation with Attorney Carol Rubin, Wisconsin Employment Relations Commission, January 5, 1987. Thus, theoretically, the union could resist the employer's attempt to provide this type of coverage because of fear the acceptance of alternative family coverage may result in some reduction in wages or wage increases or a reduction in other benefits. Although this type of resistance is theoretically possible, it is unlikely that a union would refuse a benefit offered by an employer when that benefit would help some of its members and their families.

169. See, *supra* fns. 139 to 141 and accompanying text. Additionally, the Vancouver, Canada, Municipal Regional Employees Union has successfully negotiated benefits for gay and lesbian clerical and support staff employed by the Vancouver School Board. The provision gives same-sex couples the medical and dental benefits that have been available to heterosexual couples. *Equal Times News*, p. 2 (Oct. 15, 1986).

170. Friend and Liberty, *supra* fn. 117, at 48-50. According to Neal Gleason, president of AFSCME Local #144, the Wisconsin State Employees Union bargained with the State of Wisconsin for the inclusion of "spouse equivalent" into the definition of "family" for bereavement and sick leave purposes for its 1985-1987 contracts. "Spouse equivalent" was specifically left gender neutral so that it would apply to heterosexual, gay and lesbian couples. This expanded coverage was provided to all 24,000 unionized state employees. Gleason indicated that the State was "openminded" toward this addition and did not raise any objection to the expanded family definition. (Telephone conversation with Neal Gleason in December 1986.)

M.I.S.L. is working with numerous Madison labor unions in an attempt to obtain benefits through collective bargaining. In a survey of union members, M.I.S.L. determined that 43% of survey respondents favored the extension of benefits to alternative families. See, Task Force Report, *supra* fn. 1 at section R, pg. 1-3. Of these, 100% of alternative family members, 34% of married respondents, and 53% of single respondents were supportive. *Id.*, at 8.

Examination of BNA's "What's New in Collective Bargaining Negotiations and Contracts" for the years 1984-1986 did not include any reports of unions negotiating the issue of extending employment benefits to alternative families in any area, including health in-

F. *Summary and Conclusion*

Some alternative families are currently receiving employment-related benefits equal to the benefits their co-workers receive for their traditional families. This equity in compensation has resulted from the extensive efforts of advocates using litigation, legislation and collective bargaining forums. As these efforts begin to result in benefits for alternative families, it is hoped that the equity behind such an extension will be accepted and embraced by additional employers and employees. Traditional family members have received extensive benefits for numerous years while their counterparts in alternative families have been denied access to the same benefits. The time has come to end this injustice and provide equal benefits to all families, regardless of their makeup.

IV. Obtaining Miscellaneous Traditional Family Benefits for Alternative Families

A. *Loss of Consortium*

Another benefit alternative family members are seeking is the right to bring a lawsuit for loss of consortium. Currently, loss of consortium means "loss of society, affection, assistance and conjugal fellowship, and includes loss or impairment of sexual relations."¹⁷¹ Husbands have had the right to sue for loss of consortium for at least three hundred years.¹⁷² The cause of action arose during a time that a wife was viewed as her husband's servant and thus the husband had a proprietary interest in her services.¹⁷³ The husband was entitled to a cause of action against a tortfeasor who injured his wife because the tortfeasor damaged the husband's property rights in his wife's services and society.¹⁷⁴

The modern definition of consortium has shifted its emphasis from loss of services to loss of relational interests, including the "elements of love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home."¹⁷⁵ The shift in emphasis from

surance, bereavement leave or sick leave.

171. Black's Law Dictionary 280 (5th ed. 1979).

172. *Loss of Consortium*, *supra* fn. 7 at 514. For additional discussion of consortium benefits for cohabitants *see*, Note, *Iowa Unmarried Cohabitants Denied Recovery for Loss of Consortium*, 69 Iowa L. Rev 11 (March 1984); Note, *An Unmarried Cohabitant Can Sue for Loss of Consortium if the Relationship is Both Stable and Significant*, 6 Whittier L. Rev 115 (1984); and Meade, *Consortium Rights of the Unmarried: Time for a Reappraisal*, 15 Fam. L.Q. 223 (Fall 1981) [hereinafter cited as Meade].

173. *Loss of Consortium*, *supra* fn. 7 at 514.

174. *Butcher v. Superior Court of Orange County*, 139 Cal. App. 3d 58, 60, 188 Cal. Rptr. 503, 505 (Cal. App. 4th Dist. 1983).

175. *Ledger v. Tippitt*, 164 Cal. App. 3d 625, 633, 210 Cal. Rptr. 814, 917 (Cal. App. 2d Dist. 1985). Consortium includes psychological injuries to the non-plaintiff spouse also. *Id.*

services to relational interests came with the end of viewing women as chattel and the movement toward equal rights between men and women.¹⁷⁶ Along with this shift in society's view of women came the extension to wives of the right to sue for loss of consortium.¹⁷⁷ In the first case extending this cause of action to wives, the court stated:

[W]e are not unaware of the unanimity of authority elsewhere denying . . . recovery under these circumstances But after a careful examination of these cases we remain unconvinced that the rule which they have laid down should be followed On the contrary, after piercing the thin veils of reasoning employed to sustain the rule, we have been unable to disclose any substantial rationale on which we would be willing to predicate a denial of [an] action for loss of *consortium* [to a wife].¹⁷⁸

Although now recognizing the right of both husbands and wives to sue for loss of consortium, most courts refuse to extend the right beyond husbands and wives because they define the suit as a right coming exclusively from the marital relationship.¹⁷⁹ Before *Butcher v. Superior Court of Orange County*, only two cases had extended the right to sue for loss of consortium to unmarried couples.¹⁸⁰ But for the *Butcher* court, lack of precedent was not an acceptable reason for refusing to expand the right to sue for loss of consortium.

In that case, Butcher struck and injured Paul Forte who was crossing a street.¹⁸¹ Paul was seriously injured and Cindy Forte sued as Paul's wife for loss of consortium.¹⁸² Paul and Cindy had been living together as husband and wife for 11 and ½ years at the time of the accident, and Cindy took Paul's surname when their relationship began although they were not legally married.¹⁸³ They had two children, filed joint income tax returns and maintained joint bank accounts.¹⁸⁴ Once Butcher learned that Cindy and Paul were not married, however, he moved for summary judg-

176. Comment, *Consortium Rights of Unmarried Cohabitants*, 9 A.J. Trial Ad. 147, 148 (1985) [hereinafter *Consortium Rights*].

177. *Butcher*, 139 Cal. App. 3d at 63, 188 Cal. Rptr. at 507.

178. *Hitafer v. Argonne Co.*, 183 F.2d 811, 812-813 (D.C. Cir. 1950) *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds*, *Smither and Company, Inc. v. Coles*, 212 F.2d 220 (D.C. Cir. 1957).

179. *See, Consortium Rights, supra* fn. 176, at 149-50 and the cases cited therein.

180. *See, Sutherland v. Auch Inter-Borough Transit Co.*, 366 F. Supp. 127 (E.D. Pa. 1973) [unmarried male allowed to sue for loss of consortium when fiancée was injured one month before their marriage, although damages only allowed from date of marriage] and *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980) [divorced woman allowed to sue for loss of consortium when ex-husband injured before marriage but after decision to remarry.] *Bulloch* has been criticized for ignoring previous New Jersey precedent and for being an inaccurate attempt to predict the direction New Jersey law would take. *Loss of Consortium, supra* fn. 7, at 518. *But see, Meade, supra* fn. 172, at p. 225 n. 16.

181. *Butcher*, 139 Cal. App. 3d at 59, 188 Cal. Rptr. at 504.

182. *Id.* at 60, 188 Cal. Rptr. at 505.

183. *Id.*

184. *Id.*

ment on Cindy's suit for loss of consortium.¹⁸⁵ The trial court denied the motion and the Court of Appeals affirmed its decision.¹⁸⁶

The *Butcher* court noted that a suit for consortium had shifted from one for lost services to one for interference with the continuing relational interest.¹⁸⁷ After addressing the policy reasons raised for limiting the suit to married couples, the court refused to abdicate its responsibility for the upkeep of the common law by leaving any extension of the right to the legislature.¹⁸⁸ The court cited *Rodriguez v. Bethlehem Steel Corp.* for the proposition that:

The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves 'The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice.'¹⁸⁹

The *Butcher* court concluded that other California precedent denying extension of the right for loss of consortium to children and other unmarried couples did not preclude it from extending the right in this case.¹⁹⁰ It noted that "the relationship of unmarried cohabitants bears every resemblance to the spousal relationship, including the sexual aspect absent from other relationships, except that the relationship has not been solemnized by a formal marriage ceremony."¹⁹¹

A critical question which arises from extending the right to sue for loss of consortium to unmarried couples was whether a defendant could foresee that another adult may also be interested in the victim's injuries.¹⁹² The court determined that, in contemporary society, a defendant could foresee that if he or she injured an adult, that adult was likely to be cohabiting with another adult who would have a relational interest in the victim's wellbeing.¹⁹³ The relationship of unmarried cohabitants possesses

185. *Id.*

186. *Id.* at 62, 188 Cal. Rptr. at 506.

187. *Id.*

188. *Id.*

189. 12 Cal. 3d 382, 394, 115 Cal. Rptr. 765, 525 P.2d 669 (1974). [citations omitted].

190. *Butcher*, 139 Cal. App. 3d at 65, 188 Cal. Rptr. at 508.

191. *Id.*

192. *Id.* at 67, 188 Cal. Rptr. at 510.

193. *Id.* at 67-68, 188 Cal. Rptr. at 510. The court noted that the incidence of cohabitation without marriage increased 800 percent between 1960 and 1970 and that the possibility that an adult was cohabiting with another adult was foreseeable and neither unexpected nor remote. *Id.* at 68, 188 Cal. Rptr. at 511. *See, also*, *Ledger*, 164 Cal. App. 3d at 631, 210 Cal. Rptr. at 816 where the court noted that the number of unmarried couples tripled between 1970 and 1980, increasing from 523,000 to 1,560,000.

every characteristic of marriage except formal certification and if a proper test for evaluating cohabitation relationships could be determined, no reason existed for denying a cause of action to the injured victim's partner.¹⁹⁴

In order for an unmarried cohabitant to successfully sue for loss of consortium, the plaintiff would have to show that the relationship is both stable and significant and thus parallel to the marital relationship.¹⁹⁵ The plaintiff could establish that a stable, significant relationship existed by presenting evidence of the length of the relationship, the degree of economic entanglement and cooperation, the exclusive nature of the sexual relationship, whether the parties had entered into any joint contracts, and whether there was a family relationship with children.¹⁹⁶ The court held that the trial court properly denied the defendant's motion for summary judgment and it remanded the case for consideration on the merits.

The *Butcher* court expanded the right to sue for loss of consortium to unmarried cohabitants in a well-reasoned, well-documented decision. It met its responsibility to change and expand the common law when it determined that the common law restriction on the consortium right no longer addressed the changing needs and realities of society in a just or equitable fashion. However, its expansion of the right to unmarried couples has not been followed, even in California.¹⁹⁷

In rejecting the *Butcher* analysis, the *Ledger* court held that a suit for loss of consortium could not be brought by an unmarried cohabitant.¹⁹⁸ One of the *Ledger* court's reasons for rejecting *Butcher* was its concern for reaffirming a strong public policy favoring marriage which did not have a counterpart for favoring nonmarital relationships.¹⁹⁹ While recognizing that the plaintiff had lost a loved one, the court refused to extend the consortium right to unmarried couples primarily due to a fear

194. *Butcher*, 139 Cal. App. 3d at 69, 188 Cal. Rptr. at 611.

195. *Id.* at 70, 188 Cal. Rptr. at 512.

196. *Id.*

197. See *Ledger*, 164 Cal. App. 3d at 636, 210 Cal. Rptr. at 819 and the cases cited in *Consortium Rights*, *supra* 176, at 150 fn. 37 & 38, 153 n. 60.

198. Jennifer Ledger and Richard Arters II had been cohabiting for over two years before Arters died in an automobile accident caused by Tippitt. Ledger and Arters had planned on marrying twice but were prevented from doing so both times due to external circumstances. They had a child and lived together as a family. *Ledger*, 164 Cal. App. at 630-631, 210 Cal. Rptr. at 816. The court also held that an unmarried cohabitant could not bring a wrongful death action after the death of one's partner because the right was purely statutory and only extended to the heirs named in the statute, including spouses. *Id.* at 633, 210 Cal. Rptr. at 817. But the court did extend the right to sue for negligent infliction of emotional distress from only marital or intimate familial relationships to unmarried couples. *Id.* at 643-648, 210 Cal. Rptr. at 824-828.

199. *Id.* at 636, 210 Cal. Rptr. at 819. The court's other reasons for refusing to extend a cause of action for loss of consortium to unmarried couples included being troubled by a party marrying into a cause of action, and being concerned that unmarried couples' privacy rights would be invaded while determining whether the relationship was stable and significant. *Id.* at 636-637, 210 Cal. Rptr. at 819-820.

of inconsistent results by juries attempting to determine which relationships were stable and significant.²⁰⁰

In his dissent, Judge Gilbert argued that it was not too difficult for a jury to determine what a stable and significant relationship was and that to deny recovery under the facts of that particular case was to apply the law without regard to present day reality.²⁰¹ Judge Gilbert acknowledged the similarity between alternative families and traditional families while stating that:

[F]amily may 'mean different things under different circumstances. The family, for instance, may be . . . a particular group of people related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household' This court has recognized that 'the family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life' [citations omitted].²⁰²

He also reasoned that, while some people might marry for cynical reasons, he did not believe that the opportunity to bring a suit for loss of consortium was one of them.²⁰³ To deny recovery to all unmarried plaintiffs due to the absence of a marriage certificate would result in a windfall for tortfeasors who may luckily injure the partner of an unmarried person rather than the partner of a married person.²⁰⁴

In the same way that the courts extended the right to sue for loss of consortium to women as society began to acknowledge equal rights between men and women, so too must the courts extend the right to sue for loss of consortium to unmarried couples. Although precedent does now exist, after *Butcher*, for this expansion, it will take determined plaintiffs, continuing to press for this right, in order to convince courts to consistently grant this right to unmarried couples. And in the same way that the right has begun to expand, it must continue to expand to include all individuals who have a substantial relational interest in an injured partner, at least when that interest includes the type of relationships that exist between married couples. Thus, unmarried heterosexual couples and gay and lesbian couples, who can establish a stable and significant relationship, should be granted the right to sue for loss of consortium after an injury to their partner.

B. *Unemployment and Workers' Compensation Benefits*

Unlike many other statutory entitlement programs, some statutes regulating unemployment and workers' compensation contain broad definitions of family members who may be eligible for benefits. Because of the

200. Id. at 639, 210 Cal. Rptr. at 822.

201. Id. at 650, 210 Cal. Rptr. at 829.

202. Id.

203. Id.

204. Id.

breadth of these definitions, alternative family members have, on some occasions, been able to assert and win the right to receive such benefits.

In an unemployment case, *MacGregor v. Unemployment Ins. Appeals Board*,²⁰⁵ an unmarried claimant who quit her job to accompany her family partner and their child to New York was granted unemployment compensation benefits. The California Supreme Court determined that she had established "good cause" for leaving her job because she moved to New York in order to preserve her alternative family.²⁰⁶ The Court indicated that its earlier decisions had left open the possibility that an unmarried claimant might be able to establish good cause after following a nonmarital partner to another state in order to maintain their familial relationship.²⁰⁷ Good cause existed for personal reasons unconnected to the employment situation only if those reasons were imperative and compelling.²⁰⁸ The Court found it "difficult to conceive of a more fundamental familial relationship than one which is created when two parents establish a home with their natural child."²⁰⁹ The state's policy in favor of maintaining secure, stable relationships between parents and children was as strong as its interest in preserving marriage and therefore, MacGregor's unmarried status did not preclude her from receiving benefits because moving to New York was necessary in order to maintain the family relationship with her partner and their child.²¹⁰

In a worker's compensation case, the California Court of Appeals concluded that Earl Donovan was eligible for workers' compensation death benefits after his partner committed suicide due to job-related stress.²¹¹ Donovan's partner, Thomas Finnerty, had been found 100 per-

205. 37 Cal. 3d 205, 207 Cal. Rptr. 823, 689 P.2d 453 (1984).

206. Id. at 212-13, 207 Cal. Rptr. at 828, 689 P.2d at 458. *But see*, Norman v. Unemployment Insurance Appeals Bd., 34 Cal. 3d 1, 192 Cal. Rptr. 134, 663 P.2d 904 (1983). In Norman, the California Supreme Court determined that Norman had not established "good cause" to leave her job because of her need to move with her "loved one" to Washington. Although the Court determined that nothing in her unmarried state precluded her from obtaining benefits to which she would otherwise be entitled to, the Court held that:

[i]n the absence of legislation which grants to members of a nonmarital relationship the same benefits as those granted to spouses, no basis exists in this context for extending to non-marital relations the preferred status afforded to marital relations.

Id. at 9, 192 Cal. Rptr. at 139, 663 P.2d at 909.

207. MacGregor at 207, 207 Cal. Rptr. at 824, 689 P.2d at 454. The Court examined its decision in Norman, and concluded that Norman had foreseen claims like MacGregor's and had suggested that some significant factor, in addition to a nonmarital relationship, might provide compelling circumstances thus enabling the claimant to receive benefits. Id. at 210-11, 207 Cal. Rptr. at 826-27, 689 P.2d at 456-457.

208. Id. at 209, 207 Cal. Rptr. at 826, 689 P.2d at 456.

209. Id. at 212, 207 Cal. Rptr. at 828, 689 P.2d at 458.

210. Id. at 213-14, 207 Cal. Rptr. at 829, 689 P.2d at 459.

211. Donovan v. Workers' Compensation Appeals Board, 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (Cal. App. Dist. 1982).

cent disabled due to an injury he sustained to his nervous system while working as a Deputy District Attorney.²¹² Thereafter, Finnerty committed suicide and Donovan filed for workers' compensation death benefits based on his status as Finnerty's dependent. The controlling statute extended benefits to the employee and his or her dependents; according to the statutory definition, dependent status existed only if a person was a good faith member of the employee's family or household.²¹³ The Court of Appeals held that "[m]erely because two persons of the same sex occupy a single residential structure does not dictate either the sexual influences or dependency within the meaning of the code."²¹⁴ The Court remanded the case to the Workers' Compensation Appeals Board to determine whether Donovan was Finnerty's dependent and thus eligible to receive death benefits.²¹⁵

These cases establish that alternative family status does not necessarily preclude an individual from receiving unemployment or workers' compensation benefits. If individuals are otherwise eligible and can meet the broad statutory test for eligibility, they will not always be denied benefits simply because they are not part of a traditional family relationship.

C. *Hospital Visitation and Treatment Authorization*

Another benefit routinely granted to traditional families, and denied to alternative families, is the opportunity to visit a family member in the hospital or to authorize emergency medical treatment when a family member is physically or mentally incapable of doing so. Hospitals frequently restrict visitation or emergency treatment authorization to members of the patient's immediate family. Immediate family is usually defined as husband, wife, children (although some age restrictions may apply), and others related by blood, marriage or adoption.

The impact of this restriction on visitation and treatment authorization is accentuated when a family member is already physically or mentally ill and the family itself is in a state of intense despair and distress.²¹⁶

212. *Id.* at 325, 187 Cal. Rptr. at 870.

213. *Id.* at 328, 187 Cal. Rptr. at 873. The Court of Appeals previously held that a nonmarital partner was a good faith member and dependent of the deceased employee's household and her unmarried relationship did not bar her from receiving death benefits. *Department of Industrial Relations v. Workers' Compensation Appeals Board*, 94 Cal. App. 3d 72, 78, 156 Cal. Rptr. 183, 186 (Cal. App. Dist. 1979).

214. *Donovan*, 138 Cal. App. 3d at 329, 187 Cal. Rptr. at 873. The Court's holding indicated that Donovan's alleged homosexual relationship with Finnerty did not, by itself, preclude Donovan from obtaining workers' compensation death benefits.

215. *Id.* Evidence presented to the Board had been conflicting about whether Finnerty was a gay man and thus, whether Donovan had a homosexual relationship with Finnerty and was Finnerty's dependent. *Id.*

216. "For each of us, the time will likely come or perhaps it already has when a loved one is ill or injured and brought to a hospital, and we, the loved ones, feel some of the pain and helplessness of our friend or relative What hospitals can offer and, in my opinion, as proponents of human dignity what they owe to those whom they serve is to

To then be restricted from visitation or treatment authorization simply adds to the distressing nature of the situation and tends to cause significant problems for both the patient and the patient's family members.

Examples of how this restriction works against alternative family members are found both in court cases as well as in testimony supporting passage of alternative family legislation. In *Whitman v. Mercy-Memorial Hospital*,²¹⁷ Karen Whitman and Edward Coch challenged Mercy-Memorial Hospital's policy restricting attendance in its delivery rooms by nonmedical persons to only "a husband or member of the immediate family of the mother giving birth." Because Whitman and Coch were not married, the hospital refused to allow Coch into the delivery room even though Coch was the father of Whitman's child.²¹⁸ Coch and Whitman had attended a natural childbirth course together and had received the physician's permission for Coch's presence in the delivery room. But the hospital's policy precluded his attendance at his child's birth.

In ruling that the hospital's policy discriminated on the basis of marital status in violation of the state's Civil Rights Act,²¹⁹ the court determined that the hospital was governed by the law because it was a public accommodation.²²⁰ The court noted that if Whitman and Coch had been married to one another, Coch would have been permitted into the delivery room and therefore, the hospital's policy discriminated against him due to his marital status.²²¹ Although the court agreed with the hospital that its policy regulating who could be present in its delivery room was purely discretionary and not constitutionally-based, the court held that the hospital, after establishing the policy, had to administer it in a nondiscriminatory manner.²²²

In a similar situation, the Madison Equal Opportunities Commission received testimony from a stepparent who was prohibited from visiting her stepson who was seriously ill in a Madison hospital. The woman and her husband were married in 1967 and formed a family with their eight chil-

keep loved ones close together in times of crisis. The stress of abandonment and loneliness compound the already-placed stress of uncertainty, pain, and ultimate mortality . . . It's a time when loved ones, not as defined by law but as defined by love, should be together . . . In terms of hospital visitation, I see no choice but to allow loved ones, whatever be the nature of their relatedness, to be united. If not, we are trying to cure some ills, but we are creating others . . ." Testimony of Emergency Physician Mark Katz, Sept. 20, 1984, Task Force Report, *supra* fn. 1, at section J, pages 1-2.

217. 339 N.W.2d 730 (Mich. 1983).

218. In an appeal from the trial court's denial of Coch's request for an injunction against the Hospital, the Michigan Court of Appeals agreed to decide the case even though the baby had been born before the appeal was heard and Coch had eventually been allowed into the delivery room. While the case was technically moot, the Court determined that the issue was of public significance and likely to recur in the future and thus, decided to hear the appeal. *Id.* at 731.

219. M.C.L. § 37.2302(a); M.S.A. § 3.548(302)(2).

220. *Whitman*, 339 N.W.2d at 732.

221. *Id.*

222. *Id.* at 733.

dren from previous marriages. The children were raised together as one family. Eight years later, the youngest child required emergency treatment at a hospital and was in critical condition. The hospital, responding to the natural mother's wishes, restricted visitation to the child's immediate family. The stepmother was not allowed to visit her stepson even though he was close to death. She had to rely on her husband and the child's other immediate family members to give her information about her stepson's condition. The child eventually recovered but the stepmother still lives in fear that she could again be excluded from hospital visitation.²²³

Another example indicating the serious impact of restricting treatment authorization and control to a patient's biologically-related family comes from the experience of Karen Thompson and Sharon Kowalski.²²⁴ Thompson and Kowalski are a lesbian couple who had lived together for 5 years, owned a house together and had exchanged rings symbolizing their commitment to one another.²²⁵ Kowalski was seriously injured in an accident which left her a quadriplegic. Thompson spent numerous days in the hospital with Kowalski helping her begin her recovery and at a physician's urging, informed Kowalski's parents of their lesbian relationship. Outraged by this information, the parents asserted their authority as immediate family and were named Kowalski's guardians. Although the judge granted Thompson equal access to Kowalski, the parents moved her more than 150 miles away from Thompson, thereby making visitation virtually impossible.²²⁶ The legal battle over access is continuing and currently Thompson is denied access. Kowalski, denied Thompson's help and attention, is retreating further into a coma.²²⁷

The Madison E.O.C. also received testimony from two lesbians about problems they had encountered while one of them was hospitalized in a life-threatening situation. Before the surgery, the women talked to doctors and hospital personnel in an attempt to ensure visitation by the alternative family member and permission for her to authorize emergency treatment. However, at the time of the surgery, because the patient's mother was also present, the alternative family member was harassed by hospital staff and was informed that, according to the staff, she was not family and would not be treated as such. Because she had previously obtained power of attorney authority, she was able to continue her visitation and treatment authorization but, without such documentation she would have been excluded.²²⁸

223. Testimony of Trudy Dyreson, Dec. 13, 1983, Task Force Report, *supra* fn. 1, at section 1, pages 1-2.

224. Rivera, *supra* fn. 8, at 389.

225. *Id.*

226. *Id.*

227. *Equal Times*, May 14, 1986, at 1, col. 1.

228. Testimony of Kathy Patrick, Sept. 20, 1984, Task Force Report, *supra* fn. 1, at section J, pages 30-33. Since then, Patrick's life partner, Susan Green, died following an extensive illness.

Alternative family advocates have managed to circumvent hospital restrictions in some situations by encouraging family members to plan ahead, as noted above, and develop legal documents authorizing an alternative family member to make healthcare decisions. These documents are either durable powers of attorney²²⁹ or hospital-visitation authorizations.²³⁰ These legal documents will probably be persuasive to physicians and hospital personnel and will provide important evidence of the principal's intent if court proceedings become necessary.²³¹

Under local legislation, a problem of state preemption may arise in attempting to require hospitals to recognize alternative family members to the same extent that they currently recognize immediate family members for visitation and treatment authorization purposes.²³² In a memo received April 16, 1986 by the Madison E.O.C., Assistant City Attorney Eunice Gibson informally indicated that a court would probably find that the area of authorization of health care was an area of exclusive statewide concern and thus would preempt any local attempt at regulation.²³³ As a result of that informal legal advice, the E.O.C. participated in the administrative rule-making process of the State Department of Health and Social Services in an attempt to provide statewide benefits to alternative family members. The E.O.C. encouraged the Department to amend ch. HSS 124.05(3)(b), Wis. Admin. Code, to include language ensuring hospital visitation by persons designated by the patient and to recognize medical powers of attorney for making decisions on treatment, review of patient files and visitation if the patient were unable to do so.²³⁴ The Department has not issued its revised rules and therefore, it is currently unknown whether this attempt at statewide regulation was successful.

Alternative families wanting to prevent problems with hospital visita-

229. The durable power of attorney allows the power of attorney to remain in effect despite the later incapacity of the principal. Rivera, *supra* fn. 8, at 390 n. 764. Most durable power of attorney laws are ambiguous about whether the delegation of power allows the principal to delegate authority to authorize personal acts if the principal becomes mentally incapacitated. Achtenberg, *supra* fn. 124, at § 4.07(2). Health Care Durable Powers of Attorney have been legislatively created in some states to deal with this ambiguity. *Id.* These forms would allow alternative family members to designate their family members to act in their behalf in making health care decisions and would ensure that their decisions were respected. *Id.* In states not having specific health care durable powers of attorney, alternative family members can execute a separate document authorizing an alternative family member to make only medical decisions. *Id.* at § 4.07(3).

230. This form was invented by Attorney Matt Coles of San Francisco. The impetus for the invention came after a friend of Coles was denied visitation to her alternative family member who eventually died. *National Law Journal*, Monday, August 2, 1982 at 8.

231. Achtenberg, *supra* fn. 124, at § 4.07(3).

232. *See, supra*, fn. 5.

233. April 16, 1986 memo, p. 5.

234. According to Barbara Lightner of M.I.S.L. although Wisconsin has a durable power of attorney statute, it is unclear whether it includes the authority to authorize emergency medical treatment. *See, supra* fn. 219 and accompanying text.]

tion or emergency medical authorization should obtain the necessary legal documents giving an alternative family member preference over traditional family members in making these decisions. Only in this way can they try to ensure that their families will be respected and acknowledged in these situations.

D. *Membership Benefits*

Another benefit which traditional family members receive, and which is usually unavailable to alternative family members, is the opportunity to join museums, art centers, health clubs or other organizations for a reduced family rate.²³⁵ Although some people may argue that these are not substantial benefits, they are significant for several reasons. In addition to the reduced cost resulting from family rates as opposed to separate individual rates, recognition by an organization that the alternative family is a legitimate family has a positive effect on all family members.²³⁶

Two adult alternative family members have challenged the denial of family rates for their alternative family by the Y.M.C.A. of Metropolitan Madison. *Olson and Popp v. Y.M.C.A. of Metropolitan Madison, Inc.*²³⁷ In that case, the complainants were two lesbians living with their two children as a family. They applied to the Y.M.C.A. for a family membership, were denied such a membership and instead, were offered one individual membership (for Olson) and one family membership (for Popp and her biological children).²³⁸ The complainants asserted that the Y.M.C.A.'s definition of family discriminated against them due to their marital status and sexual orientation and cost them approximately \$200 more per year than if they had been eligible for a family membership.²³⁹ The Hearing Examiner from the Madison Equal Opportunities Commission dismissed their claim on the grounds that the Equal Opportunities Ordinance, which prohibits marital status and sexual orientation discrimination, did not prohibit alternative family discrimination and thus did not cover the type of discrimination alleged by the complainants.²⁴⁰ On appeal, the

235. Some organizations are beginning, however, to recognize alternative families and are structuring their rates to include them under reduced family rates. For example, the Madison Art Center offers a reduced-rate "dual" membership available to any two individuals, regardless of relationship status. Task Force Report, *supra* fn. 1, at Section E, December 20, 1984, pg. 3.

236. The long-term impact of the acceptance of alternative families by society could reduce social stigmas that some children receive as members of an alternative family. It will also result in recognition of the parenting relations and responsibilities that co-parents have with their partners' children. Task Force Report, *supra* fn. 1, at Section E, March 15, 1984, pgs. 1-2.

237. Case No. 3110, Oct. 10, 1985.

238. *Id.* at 3. The Y.M.C.A.'s definition of family was that "[f]amily membership shall include a principal member and all members of the immediate household who are eligible to be claimed as dependents on the federal/state income tax return." *Id.* at 2.

239. *Id.* at 2-3.

240. *Id.* at 2. The complainants contended that they should have been given the op-

Madison Equal Opportunities Commission upheld the Examiner's decision that the ordinance did not require organizations to extend eligibility for family memberships to alternative families.²⁴¹

V. Conclusion

The problems encountered by alternative families seeking traditional family protections and benefits are far-reaching and omnipresent. Wherever one turns in this society, protections and benefits are afforded to traditional families and denied to alternative families. The refusal by courts to extend common law or statutory rights to alternative families and the refusal to interpret existing anti-discrimination statutes as prohibiting differentiation between traditional families and alternative families are reasons why alternative family rights' legislation needs to be enacted. Until such legislation exists, alternative families will continue to be denied those protections and benefits which traditional families enjoy and have come to expect. Only after encountering alternative family discrimination does one fully realize the pervasive and far-reaching impact that this discrimination has on a large portion of the population. All families deserve equal legal protections and benefits and until all families receive them, this pervasive discrimination will continue to injure countless family members and erode their families.

portunity to prove that the Y.M.C.A.'s neutral family definition had a discriminatory effect on them because, as lesbian adults, they could not marry under state law and thus, could not be claimed as dependents on federal or state income tax returns. *Id.* No other cases, besides those noted in the employment section, exist which allege that discrimination against an alternative family status is prohibited by existing statutes prohibiting sexual orientation or marital status discrimination.

241. *Id.* at 3. This author, a member of the Madison Equal Opportunities Commission, dissented from that decision, arguing that the Y.M.C.A.'s decision to tie family memberships to marital status had the effect of discriminating against the complainants due to their sexual orientation because they were precluded from marriage under state law. *Id.* at 5. Although the ordinance did not explicitly provide protection to alternative families, it did protect alternative family members from discrimination based on their marital status or sexual orientation and thus, in this situation, should have been interpreted to prohibit this type of discrimination. *Id.* at 5-6.

